Supreme Court, U. S.
FILED
NOV 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-792

ELLIS TRUCKING COMPANY, INC.,
an Indiana Corporation, and
NAVAJO-ELLIS TRUCKING CO., INC.,
a New Mexico Corporation,
Petitioners,

vs.

EARL L. SMART
and
LOCAL UNION NO. 299,
Affiliated with International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen and
Helpers of America,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Ellis Trucking Company, Inc. and Navajo-Ellis Trucking Co., Inc. [hereinafter referred to as Petitioners] respectfully pray that a Writ of Certiorari issue to review the decisions rendered in this cause on July 25, 1978 and August 16, 1978 by the United States Court of Appeals for the Sixth Circuit. By Order dated August 16, 1978, the United States Court of Appeals for the Sixth Circuit denied your Petitioners' Motion for Rehearing of

the July 25, 1978 decision. The mandate of the United States Court of Appeals for the Sixth Circuit was entered on August 23, 1978.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, decided and entered on July 25, 1978, is reported at 580 F.2d 215 (6th Cir. 1978) and appears in the Appendix at 8a.

The Order of the United States Court of Appeals for the Sixth Circuit, entered on August 16, 1978, denying Petitioners' Motion for Rehearing, appears in the Appendix at 14a.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan, dismissing Respondent's complaint, decided and filed on February 13, 1976, is reported at 409 F.Supp. 129 (E.D. Mich. 1976) and appears in the Appendix at 1a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 25, 1978. The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Motion for Rehearing of said decision was entered on August 16, 1978. The mandate of the United States Court of Appeals for the Sixth Circuit was entered on August 23, 1978. This Petition for a Writ of Certiorari was timely filed within ninety (90) days.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Did the Court of Appeals err in holding that the Respondent-Employee's attempt to set aside the valid arbitration award of the Joint State Cartage Committee was not barred by Appellant's failure to seek to vacate the arbitration award within the time limitations set forth in the United States Arbitration Act, 9 U.S.C. § 1, *et seq*?

II.

Did the Court of Appeals err in holding that the applicable Michigan statute of limitations was tolled as to the Respondent-Employee's claim for breach of contract while the Union and Respondent moved for three rehearings after the September 16, 1969 decision of the arbitration panel?

III.

Did the Court of Appeals err in holding that Respondent-Employee's Amended Complaint stated a claim for the breach of the duty of fair representation which would allow the Respondent-Employee to proceed against the Petitioners on his alleged claim for breach of a collective bargaining agreement?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions, statutes and rules at issue are: 9 U.S.C. § 1; 9 U.S.C. § 12; 28 U.S.C. § 1331; 29 U.S.C. § 173(d); 29 U.S.C. § 185; Rule 12(b)(6) of the Federal Rules of Civil Procedure; Mich. Comp. Laws Ann. §§ 600.5805(7), 600.5807, which are set forth seriatim in the Appendix beginning at 49a.

STATEMENT OF THE CASE

A. Procedural History of the Litigation.

This appeal is taken from the July 25, 1978 and August 16, 1978 decisions of the United States Court of Appeals for the Sixth Circuit. These decisions reversed the dismissal of the Respondent-Employee's claim for breach of a collective bargaining agreement that had previously been entered in the United States District Court for the Eastern District of Michigan, Southern Division, for failure to state a claim upon which relief could be granted.

Respondent Earl L. Smart [referred to herein as Respondent] filed his initial, one count complaint on October 16, 1973 against Ellis Trucking Company, Inc., and Navajo-Ellis Trucking Co., Inc., [referred to herein as Petitioners]. (15a). Jurisdiction was premised upon 28 U.S.C. § 1331 since Petitioners are foreign corporations. The Respondent alleged that Petitioners had breached a collective bargaining agreement by discharging him without just cause. Petitioners filed a Motion to Dismiss Plaintiff's Complaint on March 19, 1974 alleging that the grievance and arbitration procedure of the collective bargaining agreement was Respondent's sole and exclusive remedy. (19a). On June 17, 1974, Respondent filed an Amended Complaint which contained second and third counts and added Local Union No. 299 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, [referred to herein as Union]. (27a). Jurisdiction over the Union was promised upon 29 U.S.C. § 185. Count I again alleged a breach of the collective bargaining agreement. Count II alleged that the Union had breached its duty of fair representation and Count III stated that Petitioners and the Union had conspired against Respondent.

On July 3, 1974, Petitioners filed a Motion to Dismiss Plaintiff's Amended Complaint on the grounds that (1) the prior arbitration award against Respondent was final; (2) Respondent's attempt to vacate the arbitration award was barred by the three month limitation period set forth in 9 U.S.C. § 12; (3) Respondent's claims for an alleged breach of the duty of fair representation and conspiracy were barred by the three year statute of limitations contained in M.C.L.A. § 600.5805(7); and (4) the Amended Complaint failed to state a claim upon which relief could be granted. (47a). The Union filed a Motion to Dismiss the Amended Complaint on July 16, 1974 and claimed therein that the action was barred by the aforementioned Michigan three year statute of limitations. After oral argument on the Motions to Dismiss on August 12, 1974, Respondent filed a Second Amended Complaint on August 22, 1974 without leave of the Court.

On February 13, 1976, the Honorable Lawrence Gubow issued a Memorandum Opinion and Order (1a) granting dismissal of the Amended Complaint. The claim for breach of the collective bargaining agreement was dismissed against Petitioners on the basis that the arbitration award was final and binding. (4a). The claims for breach of duty of fair representation and conspiracy were dismissed for the reason that those actions were barred by the three year statute of limitations. (6a-7a). The decision also rejected Respondent's Second Amended Complaint as being improperly filed. (3a).

In its July 25, 1978 decision, the United States Court of Appeals for the Sixth Circuit affirmed the dismissals of Counts II and III based upon the statute of limitations. (10a). However, the Sixth Circuit Court of Appeals reversed the dismissal of Count I of the Amended Com-

plaint, which alleged wrongful discharge, after finding that the statute of limitations was tolled during the period that Respondent and the Union made three requests for rehearing and had a second-intervening arbitration before the Joint State Cartage Committee.

B. Statement Of Facts Relevant To The Issues Presented For Review.

Respondent was discharged from his employment by Petitioners on September 15, 1969 for refusing to perform services for the Kroger Company, a customer of Petitioners, and for stealing time. (1a). Prior to his discharge on September 15, 1969, Appellant received warning notices on January 24, 1969 and January 31, 1969. The warning notice of January 31, 1969 informed Respondent that a future violation would result in discharge.

Article 43 of the collective bargaining agreement between Petitioners and the Union, who represented the Respondent, provided for arbitration before the Joint State Cartage Committee. (21a-23a). Article 43, Section 1, provided that "such decision will be final and binding upon both parties." (22a).

Respondent's discharge was submitted to the Joint State Cartage Committee and upheld on September 16, 1969. (8a). A rehearing was denied on October 21, 1969. The Union sought and was granted a rehearing on December 19, 1969 and the discharge was upheld at the rehearing held on January 20, 1971. (8a). A third rehearing was requested and denied by the Joint State Cartage Committee on April 13-14, 1971.

The Amended Complaint, filed on June 17, 1974, alleged that the Union breached its duty of fair representation by failing to call certain witnesses on Respondent's behalf.

This was the sole factual allegation made in support of the claim that the Union had breached its duty of fair representation.

REASONS FOR GRANTING THE WRIT

The July 25, 1978 decision of the Sixth Circuit Court of Appeals held that the claim for the breach of duty of fair representation was barred by the applicable statute of limitations and mandated a dismissal of the Union. However, the Sixth Circuit then proceeded to hold that the Respondent could still pursue a cause of action for breach of the collective bargaining agreement against the Petitioners.

The Sixth Circuit also held that, despite the fact that the Respondent-Employee was seeking to overturn the prior arbitration award, which had upheld his discharge, the Respondent was not bound by the time limitations contained in the United States Arbitration Act, 9 U.S.C. § 12. The Sixth Circuit also ruled that the applicable statute of limitations was tolled while the Respondent-Employee and the Union moved for three successive rehearings.[1] As a result, the Union was dismissed while the Petitioners remained a party defendant to the litigation.

Finally, the Sixth Circuit held that mere conclusory allegations of a breach of the duty of fair representation, not supported by any specific facts, was sufficient to allow an employee to relitigate a claim for wrongful discharge even though the propriety of the discharge had been decided by final and binding arbitration.

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[1] The tolling argument was never raised by the Respondent in the lower court or the Court of Appeals, and thus was raised *sua sponte* by the Sixth Circuit in its decision.

Petitioners submit that the July 25, 1978 decision undermines and frustrates three settled principles of federal labor policy and conflicts with numerous decisions of this Court and the courts of appeals. First, it enables employees to attack arbitration decisions, which were rendered years prior to the institution of litigation, thereby seriously viscerating the congressional policy relative to the finality of arbitration awards. (*See*, 29 U.S.C. § 173(d)). Not only does this holding frustrate the congressional policy embodied in 29 U.S.C. § 173(d), but, more importantly, it is in direct conflict with this Court's consistent pronouncements relative to the federal labor policy favoring the finality of arbitration awards in labor disputes. *See, United Steelworkers of America* v. *Enterprise Wheel Corp.*, 363 U.S. 593, 599 (1963); *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 566 (1963); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-563 (1976).

Secondly, the decision, in first rejecting the use of the three month limitation period contained in 9 U.S.C. § 1 and then extending the statute of limitations through the use of an artificial tolling concept, impedes and frustrates the federal labor policy favoring the rapid disposition of labor disputes. *See, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Hoosier Cardinal Corporation*, 383 U.S. 696, 707 (1966).

Finally, by placing the employer in the impossible position of defending an untimely claim for breach of the duty of fair representation without the Union as a party to the proceedings and without access to witnesses and evidence, labor arbitration becomes a totally undesirable vehicle for labor dispute resolution.

The failure of the Sixth Circuit to recognize these important and fundamental policies of federal labor law led that Court to commit three fundamental legal errors that not only prejudice the Petitioners in the instant case but will continue to undermine labor arbitration in this country until said decision is reversed.

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE RESPONDENT-EMPLOYEE'S ATTEMPT TO SET ASIDE THE VALID ARBITRATION AWARD OF THE JOINT STATE CARTAGE COMMITTEE WAS NOT BARRED BY THE TIME LIMITATIONS SET FORTH IN THE UNITED STATES ARBITRATION ACT.

Count I of Respondent's Amended Complaint was conveniently labeled as a suit to redress an alleged wrongful discharge in breach of the collective bargaining agreement. However, the question of whether or not there was a breach of the labor agreement was determined by the Joint State Cartage Committee on September 16, 1969 wherein the propriety of Respondent's discharge was upheld. However, the original complaint was not filed by the Respondent until October 16, 1973.

A review of Count I of the Amended Complaint reveals that Appellant is seeking to set aside the September 16, 1969 arbitration award since the issue of breach of contract has already been decided by the arbitration panel in accordance with the provisions of the labor agreement.

Thus, there can be no question whatsoever that the instant suit, regardless of the fact that it is brought under Section 301 of the Labor and Management Relations Act, 29 U.S.C. § 185, is, in reality, a suit to vacate the arbitra-

tion award. Given that fact, Petitioners submit that the timeliness of this action is governed by the United States Arbitration Act, 9 U.S.C. § 1, *et seq.*[2] The time limitations for vacating an arbitration award are set forth in 9 U.S.C. § 12 which provides:

> "Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

Since Respondent's complaint was not filed until October 16, 1973, it is self-evident that Respondent far exceeded the three month period of limitations.

The Sixth Circuit, in rejecting the applicability of 9 U.S.C. § 12, stated that: "The § 301 action is 'independent' of the grievance process." (13a). In so holding, without the citation of any applicable authority, the Sixth Circuit departed from a long line of legal precedents that have

[2] In the lower court, the Respondent argued that the United States Arbitration Act was inapplicable given the exclusion in 9 U.S.C. § 1 relative to contracts of employment. However, this Court's ruling in *J. I. Case Company* v. *National Labor Relations Board*, 321 U.S. 332, 334-335 (1943), made clear that a collective bargaining agreement is not a contract of employment. Based upon this Court's decision in *J. I. Case Company* v. *National Labor Relations Board, supra*, numerous courts, including the Sixth Circuit, have held that a collective bargaining agreement is not a contract of employment and that 9 U.S.C. §1, *et seq* applies with full force and effect to arbitrations under collective bargaining agreements. *See, Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327*, 217 F.2d 49, 51 (6th Cir. 1954); *Local 19, Warehouse Processing and Distributive Workers Union* v. *Buckeye Cotton Oil Company*, 236 F.2d 776, 781 (6th Cir. 1956); *Local 205, United Electrical, Radio & Machine Workers of America* v. *General Electric*, 233 F.2d 85, 97-100 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957); *United Office Professional Workers of America* v. *Monumental Life Insurance Co.*, 88 F.Supp. 602, 606 (E.D. Pa. 1950); *LeWittes & Sons* v. *United Furniture Workers*, 95 F.Supp. 851, 855-856 (S.D. N.M. 1951).

held that the time limitations contained in 9 U.S.C. § 12 or similar state arbitration acts apply to actions brought under § 301 of the Labor Management and Relations Act.[3]

In *Metal Products Workers Union, Local No. 165, UAW-AFL-CIO* v *Torrington Company*, 242 F.Supp. 813 (D. Conn. 1965), *aff'd*, 358 F.2d 103 (2d Cir. 1966), the plaintiff-union brought suit against the employer under § 301 in order to enforce an arbitration award. The employer contended that the Connecticut statute of limitations was applicable rather than 9 U.S.C. § 12. In rejecting that contention, the district court held that 9 U.S.C. § 12 applied to an action brought under § 301 based upon the following rationale:

> "The Court sees no reason to depart from the firmly established practice in this Circuit of exercising jurisdiction pursuant to Section 301(a) in actions involving the obligations of parties to arbitrate under a collective bargaining agreement where the remedy sought is one authorized by the Arbitration Act.
>
> It follows that the period of limitation applicable in the instant proceeding is the three month period prescribed by the United States Arbitration Act and not, as the Company urges, the shorter Connecticut

[3] *See, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *LaCrosse Cooler Company*, 406 F.Supp. 1213, 1214-15 (W.D. Wis. 1976); *International Brotherhood of Teamsters, Local No. 249* v. *Motor Freight Express, Inc.*, 357 F.Supp. 724, 725 (W.D. Pa. 1973); *DeLoroto* v. *United Parcel Service, Inc.*, 401 F.Supp. 408, 409 (D. Mass. 1975); *United Mine Workers of America* v. *Jones & Laughlin Steel Corporation*, 378 F.Supp. 1206, 1210-11 (W.D. Pa. 1974); *Siskey* v. *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 261*, 419 F.Supp. 48, 50, (W.D. Pa. 1976); *Cole* v. *United Steel Workers of America, Local No. 4407*, 441 F.Supp. 1346, 1371 (N.D. Pa. 1977); *Pizzuto* v. *Hall's Motor Transit Company*, 409 F.Supp. 427, 429 (E.D. Pa. 1976); *Howerton* v. *J. Christianson Company*, 76 L.R.R.M. 2936, 2938 (N.D. Cal. 1971).

period. Although the Arbitration Act itself confers no jurisdiction upon this Court, 'it does provide an additional procedure and remedy in the federal courts where jurisdiction already exists.' The Court, having determined that Section 301(a) independently establishes its jurisdiction on the parties on the subject matter of the action, finds that procedures authorized by the Arbitration Act, including the three month limitation period, were available to the Union." 242 F.Supp. at 818-819.

In *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D. N.Y. 1976), that plaintiff commenced an action under § 301 alleging a breach of the collective bargaining agreement due to wrongful discharge from his employment. The issue of alleged breach of contract had already been considered and determined by a Joint State Cartage Committee as in the subject matter case. Thereafter, the plaintiff amended his complaint to add a claim against the union for breach of the duty of fair representation. In that case, the employer argued that the three month limitation contained in N.Y. Civ. Prac. Law (McKinney) § 7511(a), which applied to the vacating or modifying of an arbitration award, was the applicable period of limitations. In accepting this contention, that Court stated:

"It is well settled that, in suits brought pursuant to Section 301 of the Labor Management Relations Act, the federal district court must apply the pertinent statute of limitations of the state in which it sits. *International Union, United Auto, etc. Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966). When such actions seek to vacate arbitration awards, courts in other jurisdictions have consistently applied the statute

of limitations pertaining to appeals from such awards rather than the longer statute of limitations governing actions bottomed on written contracts. (Citations omitted). Federal labor policy favors the application of shorter periods of limitation. *U.A.W.* v. *Hoosier Cardinal Corp., supra.*" 421 F.Supp. at 1006.[4]

A similar result, while dealing with facts similar to those present in the subject matter case, was reached in *Hill* v. *Aro Corporation*, 275 F.Supp. 482 (N.D. Ohio 1967).[5] In *Hill*, the plaintiff was discharged and his discharge was upheld by an arbitrator. Plaintiff then instituted suit in federal court seeking to vacate the award by alleging a conspiracy between the union and employer and a breach of the duty of fair representation by the union. The employer responded by moving to dismiss on the grounds that the plaintiff had failed to bring suit within the three month limitation period contained in both the Ohio and United States Arbitration Acts. In granting the employer's motion to dismiss, the Court held:

"Under federal labor law, the award would be reviewable only to the limited extent provided for

[4] In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Hoosier Cardinal Corporation, supra*, this Court held that the most applicable state statute of limitations governed actions under § 301. 383 U.S. 696, 704. However, in that case, the § 301 action was to enforce the provisions of a collective bargaining agreement and did not involve a suit to vacate, modify or alter an arbitration award as in the instant case. Thus, there was no federal statute of limitations. In the instant case, given the fact that Respondent seeks to set aside the arbitration award, it is clear that there is a federal statute of limitations which is embodied in § 12 of the United States Arbitration Act. Obviously, the limitation period in § 12 would only apply to those suits that, in essence, seek to vacate a prior arbitration award.

[5] The Sixth Circuit, in its opinion in the instant case, recognized that the *Hill* decision was factually applicable to the instant case but, without any discussion, refused to follow that decision. (13a).

> in the Ohio and Federal Arbitration Acts. But even that limited review has now been lost by the failure to act within the time limitation. The first cause of action therefore does not state a claim upon which relief can be granted and the company's motion to dismiss will be granted." 275 F.Supp. at 487.

A reading of *Hill* reveals that it is factually identical to the case at bar. As in the instant case, that plaintiff brought suit under § 301. Moreover, Respondent is seeking the same relief from the courts that was denied to him by the arbitration panel. To allow plaintiff to label a claim as a breach of contract and thereby seek to vacate an arbitrator's award would be the classic example of asserting form over substance and would subvert the national labor policies favoring finality of labor arbitration awards and the expeditious resolution of labor disputes.

Despite this unbroken line of precedents which have clearly held that suits to vacate arbitration awards under § 301 are governed by the time limitations in 9 U.S.C. § 12 or similar state arbitration acts, the Sixth Circuit refused to affirm the dismissal of the claim for breach of contract. Thus, as matters stand, the decision of the Sixth Circuit is in direct conflict with the decisions of every court that has previously decided this matter.

Not only does the decision of the Sixth Circuit conflict with all other court decisions on this issue but, more importantly, it defeats two fundamental policies of federal labor law.

A. The Decision Of The Sixth Circuit Defeats The Federal Labor Policy Favoring The Finality Of Arbitration Decisions.

It is well settled that a paramount policy of federal labor law, as embodied in 29 U.S.C. § 173(d), is the resolution of industrial disputes by arbitration rather than litigation. In an attempt to further this expressed congressional purpose, this Court has consistently held that national labor policy favors the finality of arbitration awards in labor disputes. *See, United Steel Workers of America* v. *Enterprise Wheel Corp.*, 363 U.S. 593, 599 (1963); *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 566 (1963); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-563 (1976).

The courts which have applied 9 U.S.C. § 12 have reasoned, in part, that the shorter limitation period furthers the federal labor policy supporting the finality of arbitration awards. *See, Hill* v. *Aro Corporation*, 275 F.Supp. 482, 486-487 (N.D. Ohio 1967); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *LaCrosse Cooler Company*, 406 F.Supp. 1213, 1215 (W.D. Wis. 1976); *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F.Supp. 1003, 1006 (W.D. N.Y. 1976).

Obviously, the application of the three month limitation period furthers the federal policy favoring finality of arbitration decisions. On the other hand, the Sixth Circuit's decision clearly disserves this fundamental policy of federal labor law and the end result is to allow an employee to attack an arbitration award that was initially more than four years prior to the institution of suit. When an employee can take advantage of statutes of limitations which can extend the period of vulnerability of an arbitration award for in excess of four years, it seriously impedes and hampers the federal policy favoring finality of arbitration awards.

B. The Court Of Appeals Decision Defeats The Federal Labor Policy Favoring The Expeditious Resolution Of Labor Disputes.

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Hoosier Cardinal Corporation*, 383 U.S. 696 (1966), this Court recognized the federal labor policy favoring the rapid disposition of labor disputes:

> ". . . The characterization that Indiana law imposes upon this action does not lead to any conflict with federal labor policy. Indeed, to the extent that a policy is manifest in the Labor Management Relations Act, it supports acceptance of the characterization adopted here. The six months' provision governing unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. § 160(b), suggests that relatively rapid disposition of labor disputes is a goal of federal labor law." 383 U.S. at 707.

The recognition in *Hoosier Cardinal* favoring rapid disposition of labor disputes, has been consistently followed by the lower courts as a policy rationale for applying the three month limitation period in 9 U.S.C. § 12. *See, United Mine Workers of America* v. *Jones & Laughlin Steel Corporation*, 378 F.Supp. 1206, 1211 (W.D. Pa. 1974); *International Brotherhood of Teamsters, Local Union No. 249* v. *Motor Freight Express, Inc.*, 357 F.Supp. 724, 726 (W.D. Pa. 1973); *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F.Supp. 1003, 1006 (W.D. N.Y. 1976).

The application of 9 U.S.C. § 12, when dealing with cases involving arbitration awards, clearly furthers the policy behind rapid disposition of labor disputes. On the other hand, the Sixth Circuit's ruling, which summarily rejected the applicability of 9 U.S.C. § 12, extends the vulnerability of arbitration awards to various limitation periods depending on the state in which the cause of action accrued. Moreover, the Sixth Circuit's decision removes the possibility of having a uniform period to govern suits to set aside, vacate or modify arbitration awards.

The Sixth Circuit ignored this fundamental policy rationale when it held that the three month limitation period in 9 U.S.C. § 12 was inapplicable to actions brought under § 301. This case now presents this Court with the opportunity to definitively hold that suits to vacate arbitration awards, even when labeled as contract actions under § 301, are governed by the uniform limitation period in 9 U.S.C. § 12 and thereby further the dual policies of federal labor law favoring the finality of arbitration awards and the rapid disposition of labor disputes.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS WAS TOLLED WHILE THE RESPONDENT MOVED FOR THREE REHEARINGS OF THE DECISION OF THE ARBITRATION PANEL.

In the event that 9 U.S.C. § 12 is inapplicable, the Sixth Circuit correctly held that the most analogous state statute of limitations was the limitation period dealing with injuries to persons contained in M.C.L.A. § 600.5805(7).[6] The Sixth Circuit held that the three year statute of limitations barred the action for the alleged breach of the duty of fair representation.

However, the Sixth Circuit then departed from settled precedent by holding that the claim for wrongful discharge against the Petitioners was not barred by the three year statute of limitations. The Sixth Circuit reached its conclusion by holding that the statute of limitations was tolled while the employee moved for three rehearings. Thus, the

[6] There can be no question, in Michigan, that the three year statute of limitations applies to claims for breach of the duty of fair representation. *See, Glowacki* v. *Motor Wheel Corporation*, 67 Mich. App. 448, 462-463, 241 N.W. 2d 240 (1976); *Washington* v *Chrysler Corporation*, 68 Mich. App. 374, 377, 242 N.W.2d 781, 782 (1976); *Priest* v. *Wolverine Express, Inc.*, 87 L.R.R.M. 2774, 2775 (W.D. Mich. 1974); *Manfrin* v. *UAW Local 44*, 89 L.R.R.M. 2319 (E.D. Mich. 1975); *Morin* v. *Buick Motor Division*, 91 L.R.R.M. 2578, 2579 (E.D. Mich. 1976); *Pesola* v. *Inland Tool and Manufacturing, Inc.*, 93 L.R.R.M. 2458, 2460 (E.D. Mich. 1976); *Williams* v. *Dana Corporation*, 54 F.R.D. 473, 474 (E.D. Mich. 1971). The Michigan courts have also ruled that a claim against an employer for wrongful discharge is also governed by the three year statute of limitations. *See, Glowacki* v. *Motor Wheel Corporation*, 67 Mich. App. 448, 462-463, 241 N.W.2d 240 (1976) and *Curry* v. *Chrysler Corporation*, 95 L.R.R.M. 2356, 2357-2358 (E.D. Mich. 1977). It must be noted that, in neither *Curry* nor *Glowacki*, had the matter proceeded to arbitration so there was no question as to the applicability of the limitation period for vacating an arbitration award.

statute of limitations was tolled for over nineteen months after the September 16, 1969 arbitration award.

In reaching this conclusion, the Sixth Circuit held that, since exhaustion of contractual remedies was a prerequisite to court litigation under § 301, an employee should not be penalized for exhausting these procedures. (13a). Petitioners submit that tolling the statute of limitations while an employee, at his own discretion, seeks numerous rehearings violates federal labor law policy favoring the finality of arbitration awards and the expeditious resolution of labor disputes.

It is elementary that a cause of action accrues, for purposes of computing the statute of limitations, on the first day on which a cause of action could have been mantained. *See, Moline Plow Co.* v. *Webb*, 141 U.S. 616, 623-624 1891); *Oppenheim* v. *Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978); *Hodge* v. *Service Machine Company*, 438 F.2d 347, 349 (6th Cir. 1971); *United States* v. *First National Bank of Atlanta*, 441 F.2d 906, 908-909 (5th Cir. 1971); *Dore* v. *Kleppe*, 522 F.2d 1369, 1373, *rehearing denied*, 526 F.2d 697 (5th Cir. 1976).

Petitioners do not dispute the fact that exhaustion of contractual remedies is a prerequisite to suit under Section 301. *See, Republic Steel Corporation* v. *Maddox*, 379 U.S. 650, 652-653 (1965); *Vaca* v. *Sipes*, 386 U.S. 171, 185 (1967). In the case at bar, however, all contractual remedies were exhausted on September 16, 1969 when the Joint State Cartage Committee upheld the Respondent's discharge. This decision was final and binding. (22a). At that time, the Respondent's cause of action accrued under § 301 since the Respondent could then have maintained a suit for alleged breach of the collective bargaining agreement.

By holding that the statute of limitations was tolled

while the Respondent voluntarily pursued three rehearings, which were neither authorized nor required by the applicable collective bargaining agreement, the Sixth Circuit's decision is in irreconcilable conflict with prior decisions of this Court as well as the decisions of numerous other circuit courts of appeals. Additionally, the Sixth Circuit's ruling does a disservice to the congressional policies favoring final and binding arbitration and the expeditious resolution of labor disputes. The ramifications of the Sixth Circuit's holding will be discussed separately.

A. The Decision Of The Sixth Circuit Is In Irreconcilable Conflict With Prior Decisions Of This Court And Other Circuit Courts Of Appeals.

Since a § 301 suit could have been maintained by Respondent at any time after September 16, 1969, it is clear that Respondent's voluntary choice to seek three rehearings cannot toll the statute of limitations.

The Sixth Circuit's ruling stands in direct conflict with decisions of this Court that have considered analogous factual situations. For example, in *International Union of Electrical, Radio and Machine Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), a black female requested that the 180 day filing requirement in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, be tolled while the grievance procedure in the collective bargaining agreement was being exhausted. In rejecting the argument that the statutory filing requirement was tolled during the pendency of the grievance proceedings, this Court, in referring to its prior decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), reasoned as follows:

> "We reason that the contractual rights under the collective bargaining agreement and the statutory rights provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee,' 415 U.S. at 52, 39 L. Ed. 2d 147, 94 S. Ct. 1011, and for that reason we concluded:
>
> > '[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.' " 429 U.S. at 236.[7]

In light of the Sixth Circuit's statement in this case that: "The § 301 action is 'independent' of the grievance process," (13a), it is clear that both *Alexander* and *Robbins & Meyers* mandate a finding that the Respondent's requests for three rehearings of the September 16, 1969 arbitration award did not toll the statute of limitations for § 301 purposes.

An analogous situation also existed in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) wherein that plaintiff argued that the filing of a Title VII charge with the Equal Employment Opportunity Commission tolled the statute of limitations under 42 U.S.C. § 1981. This Court flatly rejected this contention by holding that the administrative proceedings before the EEOC did not toll the statute of limitations relative to the claim under 42 U.S.C. § 1981 since the two statutes were separate and independent.[8]

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[7] Accord: *Walker* v. *World Tire Corp., Inc.*, 563 F.2d 918, 919 n. 1 (8th Cir. 1977); *Chrysler Corporation* v. *Civil Rights Commission*, 68 Mich. App. 276, 288-289, 242 N.W.2d 556 (1976).

[8] Accord: *Jones* v. *City of San Antonio*, 568 F.2d 1224, 1226 (5th Cir. 1978); *Burns* v. *Union Pacific Railroad*, 564 F.2d 20, 21 (8th Cir. 1977); *Dupree* v. *Hutgins Brothers*, 521 F.2d 236, 238 (5th Cir. 1975); *Cates* v. *Trans World Airlines*, 561 F.2d 1064, 1072-1073 (2d Cir. 1977); *Washington* v. *Chrysler Corporation*, 68 Mich. App. 374, 380, 242 N.W.2d 781 (1976).

The circuit courts of appeals, in analogous fact situations, have consistently held that pursuit of optional administrative remedies does not toll the statute of limitations relative to claims under specific statutes. For example, in *Bireline* v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), the plaintiff-teacher was notified that she would receive a terminal contract on May 19, 1970. The plaintiff requested reconsideration and, thereafter, requested an administrative appeal which was denied on October 25, 1971. An action was then filed on June 29, 1973 under 42 U.S.C. § 1983. In rejecting the plaintiff's claim that the statute of limitations was tolled while she sought reconsideration and an administrative hearing, the Fourth Circuit stated:

> "While plaintiff was granted an administrative hearing after May 19, 1970, and it may have been appropriate for her to have delayed filing her complaint until after its conclusion, the pendency of the administrative consideration did not extinguish the legal right to proceed in court or suspend it. The fact that she was unsuccessful in the administrative reconsideration did not create a new cause of action; it only made it apparent that if she were to obtain relief it could only come as a result of a successful lawsuit commenced within three years following May 19, 1970." 567 F.2d at 263.

In *Fitzgerald* v. *Seamans*, 553 F.2d 220 (D.C. Cir. 1977), the plaintiff was terminated on January 5, 1970 from his position with the United States Air Force. The plaintiff appealed to the United States Civil Service Commission on January 20, 1970 and, after securing partial relief from the administrative body, instituted suit on January 25, 1974. In holding that the proceedings before the Civil Service Commission did not toll the statute of limitations, that court of appeals stated:

> "Since appellant had the option to bring an action for the harm done to him by appellees concurrently with his recourse to the CSC, he cannot now untimely invoke the judicial remedy because the administrative one does not make him whole. *The choice of whether to pursue one remedy or the other, or both, may be difficult, but Fitzgerald had the choice, and was not barred from the damages action by an exhaustion requirement. There was no guarantee that the CSC route would be successful, speedy or complete. But the administrative and judicial remedies were independent. And the limitations period ran on the judicial remedy independently of the CSC proceeding.*" 553 F.2d at 226-227. (Emphasis added).[9]

As in *Bireline* and *Fitzgerald*, the plaintiff, in the subject matter case, had fully exhausted all administrative remedies on September 16, 1969.

As of September 16, 1969, the judicial and any further optional contractual remedies were totally independent and plaintiff could have pursued either or both of theese remedies. Under the settled decisions of this Court and other circuit courts of appeals, the filing of three motions for rehearing did not suspend his right to seek a judicial remedy. Obviously, the subsequent rehearings could not

[9] Accord: *Chambers* v. *Omaha Public School District*, 536 F.2d 222, 230 (8th Cir. 1976) (exhaustion of administration remedies under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, did not toll action under 42 U.S.C. § 1983); *Bryant* v. *Potts*, 528 F.2d 621, 622 (5th Cir. 1976) (prison administrative procedures did not toll statute of limitations under 42 U.S.C. § 1983); *Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Company of Texas*, 511 F.2d 1073, 1079 (10th Cir. 1975) (motions to alter judgment and new trial under Rule 59 of the Federal Rules of Civil Procedure did not toll the statute of limitations under § 16b of the the Clayton Act).

toll the operation of a statutory cause of action since no further exhaustion was required under this Court's decisions in *Republic Steel Corporation* v. *Maddox, supra,* and *Vaca* v. *Sipes, supra.*

The fact that requests for rehearing or reconsideration do not toll the statute of limitations was recognized in *Jolivet* v. *Elkins,* 386 F.Supp. 261 (D. Md. 1974). In *Jolivet,* a former law student sued under 42 U.S.C. § 1983 alleging that he had been refused readmission because of his race. In holding that that plaintiff's continual requests for readmission and rehearing did not toll the statute of limitations, the Court stated:

> "If plaintiff could continue the tolling of the three-year statute of limitations merely by periodically filing further petitions for readmission, he could effectively prevent for an indefinite period of time the application of any limitations period to him. Such a result would put it in the power of the plaintiff to enlarge the time set by statute for commencing suit." 386 F.Supp. at 271-272.

In the instant case, the Sixth Circuit's finding that the petitions for rehearing tolled the statute of limitations effectively placed the running of the limitations period in the hands of the Respondent. The employee can now extend the statute of limitations by merely filing a request for rehearing of the arbitration decision. In the subject matter case, the requests for rehearing extend the limitations period for over one and one-half years after final and binding arbitration. This type of exhaustion is certainly not required under either *Vaca* or *Maddox* and, in any event, would in no way alter the fact that the plaintiff could have also pursued any statutory remedy under § 301 after the arbitration award of September 16, 1969.

Thus, the Sixth Circuit's opinion stands in direct contradiction to decisions of this Court and other circuit courts of appeals and should be subjected to immediate review by this Court and subsequent reversal.

B. The Sixth Circuit's Decision Destroys The Symmetry Required By Federal Labor Policy.

The Sixth Circuit's ruling dismissed the claim for breach of the duty of fair representation as being time barred but allowed the Respondent to proceed against the Petitioners for breach of the collective bargaining agreement. Prior to the July 25, 1978 decision of the Sixth Circuit, it was well settled that in order to recover against the employer under § 301 where there exists grievance machinery culminating in final and binding arbitration, an employee would first have to establish that the union breached its duty of fair representation. *Barrett* v. *Safeway Stores, Incorporated,* 538 F.2d 1311, 1315 p. 3, 1316 (8th Cir. 1976); *Warren* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 544 F.2d 334, 341 (8th Cir. 1976); *Lewis* v. *No. 1 Greyhound Lines, East,* 411 F.Supp. 368 (D. D.C. 1976), *aff'd,* 555 F.2d 1053, 1054-1055 (D.C. Cir. 1977). This rule was first stated by this Court in *Vaca* v. *Sipes, supra,* when it stated:

> "For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.*" 386 U.S. at 186. (Emphasis added).

More recently, in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976), this Court reaffirmed its holding in *Vaca* when it stated:

> "To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." 424 U.S. at 570-571.

Pursuant to the *Vaca-Hines* doctrine, the circuit courts of appeals, including the Sixth Circuit, have consistently dismissed breach of contract claims under § 301 where the employee did not state a claim against the union for breach of the duty of fair representation due to the failure to plead sufficient facts[10] or due to the failure to exhaust intra-union remedies.[11]

Thus, the law had previously been settled that a viable claim of a breach of the duty of fair representation was a prerequisite to a § 301 contract action against the employer. The Sixth Circuit's departure from this settled precedent not only destroys the necessary symmetry between the claim for breach of contract and the breach of duty but also is fundamentally unfair to an employer who is forced to defend without access to evidence and witnesses, a breach of duty claim.

If the purpose of the statute of limitations is to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have been faded and witnesses have disappeared, *Burnett* v. *New York Central Railroad Company*, 380 U.S. 424, 428 (1965); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1943), it is clear that the claim for breach of the duty of fair representation should be barred as to the employer as well as the union. Common sense and fundamental fairness would indicate that, if the claim is too "stale" for the union to defend, it is also too "stale" for the employer to properly defend. The fundamental injustice in requiring an employer to defend a claim to which he does not have total access to the evidence and where collusion between the union and employee is a distinct possibility, has led several courts to require the union to be a party defendant. For example, in *Atwood* v. *Pacific Maritime Association*, 432 F.Supp. 491 (D. Ore. 1977), that court refused to grant the plaintiff's request to dismiss the union as a party defendant because:

> "First and most important, it is simply unfair to expect the Employers to litigate and defend the Union against plaintiff's claim of unfair representation. The Union has best access to the appropriate witnesses and evidence and should defend its own position. While the Employers certainly have an interest in this issue and may participate in its trial, they should not be required to assume sole responsibility—especially in view of the relative longevity of this action." 432 F.Supp. at 495.

Again, in *Lowther* v. *Fred W. Albrecht Grocery Company*, 97 L.R.R.M. 2278 (M.D. Ohio 1977), that court found that the Ohio statute of limitations governing breaches of stat-

[10] *See, Barrett* v. *Safeway Stores, Incorporated*, 538 F.2d 1311, 1315, f.n. 3, 1316 (8th Cir. 1976); *Lewis* v. *No. 1 Greyhound Lines East*, 411 F.Supp. 368 (D. D.C. 1976), *aff'd*, 555 F2d 1053, 1054-1055 (D.C. Cir. 1977); *Warren* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 544 F.2d 334, 341 (8th Cir. 1976).

[11] *See, Fleming* v. *Chrysler Corporation*, 575 F.2d 1187, 1188-1189 (6th Cir. 1978); *Willetts* v. *Ford Motor Company*, 99 L.R.R.M. 2399 (6th Cir. 1978); *Harrison* v. *Chrysler Corporation*, 558 F.2d 1273, 1278-1279 (7th Cir. 1977); *contra, Winter* v. *Local Union No. 639*, 569 F.2d 146, 153 (D.C. Cir. 1977).

utory duties was the most applicable limitation period. The court also held that the same statute of limitations applied to the employee's claim against the employer for breach of the collective bargaining agreement. In so doing, that court reasoned:

> "Moreover, such limitations period shall also be applied to plaintiff's breach of the collective bargaining agreement claim. Said claim against Albrecht is apparently ancillary to that against the union. It is well settled that a claim by an employee against an employer for breach of a bargaining agreement containing a grievance arbitration procedure cannot be maintained unless the employee has at least attempted to exhaust said procedure, or that such would be futile. *Vaca* v. *Sipes*, 386 U.S. 171, 184, 87 S. Ct. 903, 914, 64 L.R.R.M. 2369 (1967). The action against the employer, however, can be brought in such circumstances only if there is an actionable claim against the union for breach of its duty of fair representation. Id. Therefore, if the action against the union is barred, so is the action against the employer." 97 L.R.R.M. at 2280.[12]

The need for symmetry between the claims for breach of contract and breach of the duty of fair representation have led at least two circuits to apply the same limitation period to the union and the employer. *See, Butler* v. *Local Union 823, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 514 F.2d 442, 448 (8th Cir. 1975), *cert. denied*, 423 U.S. 934 (1976) and *Abrams* v. *Carrier Corporation*, 434 F.2d 1234, 1252-1253

[12] Accord: *Grant* v. *Mulvihill Brothers Motor Service*, 428 F.Supp. 45 (N.D. Ill. 1976); *Vandever* v. *Bell Helicopter Company*, 93 L.R.R.M. 2235, 2237 (M.D. Tex. 1976); *Brooks* v. *Southwestern Transportation Company*, 97 L.R.R.M. 2616 (N.D. Tex. 1978); *Glowacki* v. *Motor Wheel Corporation*, 67 Mich. App. 448, 462-463, 241 N.W.2d 240 (1976).

(2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971).[13] Although the lower court initially recognized the need for symmetry in holding that the three year statute of limitations was applicable to the contract and breach of duty claims, the Sixth Circuit proceeded to destroy this symmetry by employing an artificial means of tolling which indefinitely extends the statute of limitations as to the claim against the employer. Indeed, a reading of *Butler*, which was the only case cited by the Sixth Circuit in support of its holding that the statute of limitations was tolled, actually supports the position of Petitioners in this matter.[14] In *Butler*, the plaintiff was discharged on March 29, 1967 and the grievance was rejected on August 2, 1967. The Eighth Circuit first held that a five year statute of limitations governed the claim against the union and that, since the complaint was filed on June 8, 1972, the action was timely as to the union.

With regard to the employer, the Eighth Circuit held that the cause of action accrued upon the termination of the grievance proceedings on August 2, 1967 since, at that point in time, the employee had exhausted his contractual

[13] Petitioners do acknowledge that two circuit courts of appeals have held, albeit without any extensive reasoning or rationale, that the fact that the claim for breach of duty of fair representation is barred as to the union does not preclude a recovery against the employer. *See, Sanderson* v. *Ford Motor Company*, 483 F.2d 102, 114 (5th Cir. 1973) and *De Arroyo* v. *Sindicato De Trabajadores Packing House*, 425 F.2d 281, 286-287 (1st Cir. 1970). However, Petitioners respectfully submit that neither the First nor Second Circuits considered the compelling policy reasons behind requiring that the plaintiff submit a viable claim for breach of the duty of fair representation for the employer to defend.

[14] It must be noted that *Butler* was decided prior to the decisions of this Court in *Johnson* v. *Railway Express Agency, Inc.*, *supra*, and *International Union of Electrical, Radio and Machine Workers* v. *Robbins & Meyers, Inc.*, *supra*, wherein this Court rejected similar tolling arguments.

remedies. The employer had alleged that the cause of action accrued at the time of the employee's discharge. The Eighth Circuit's decision indicated that an essential basis for its holding was the necessity for having both the employer and the union as parties to the litigation. 514 F.2d 447, 448. If the court had held that the cause of action accrued on March 29, 1967, the action would have been barred as to the employer but not against the union. The *Butler* court indicated that such a result would be unwarranted because:

> "In instances where the employer had acted entirely in good faith in its interpretation of the contract, it will be protected if the union has fairly represented the employee, but it will be vulnerable if the union has acted unfairly. Because a good faith employer's liability is dependent upon the union's conduct, there is an inherent unfairness in a rule which would allow the union to raise the limitations defense while denying such a defense to the employer. The Supreme Court in *Vaca* recognized the importance of having both defendants before the Court:
>
> > "* * * [I]t is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer is proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that litigated the fault of the employer and union to fashion a remedy only with respect to the employer? * * *' " 514 F.2d at 448.

The *Butler* rationale has been totally undermined by the present decision of the Sixth Circuit. By its decision, the Sixth Circuit allowed the employer to remain a party defendant and further required he employer to defend a claim which it admitted was too "stale" for the union to defend. Moreover, this Court must inquire as to what possible sense exists in a rule of law which would require the court to fashion a remedy as to the employer but not as to the union.

The fundamental error in the Sixth Circuit's ruling is that there was absolutely no legal basis for tolling the statute of limitations beyond the issuance of the September 16, 1969 arbitration award. A rule of law that tolled the statute of limitations until the exhaustion of the arbitration provision in the labor contract would certainly further federal labor policy. This event occurred, under the parties' contract, on September 16, 1969, Thereafter, any tolling requirement merely disserves federal labor policy and places the running of the statute of limitations in the control of the employee.

C. The Congressional Policy Favoring Arbitration And Expeditious Resolution Of Labor Disputes Is Disserved By The Sixth Circuit's Tolling Requirement.

In *Burnett* v. *New York Central Railroad Company*, 380 U.S. 424 (1965), this Court stated:

> "These authorities indicate that the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." 380 U.S. at 427.

Petitioners submit that tolling the statute of limitations beyond the rendition of the September 16, 1969 arbitration award totally disserves the congressional policy and purpose favoring labor arbitration and expeditious resolution of labor disputes.

First, it is self-evident that the Sixth Circuit's tolling requirement, which places the running of the statute of limitations in the hands of the employee, does not effectuate the congressional purpose of rapid disposition of labor disputes. To the contrary, the Sixth Circuit's tolling exemption allows the statute of limitations to be renewed by the mere filing of a petition for rehearing. When, as in the instant case, there is no requirement that a petition for rehearing be filed, it is clear that such filing should not be allowed to delay the final disposition of a labor dispute. Indeed, this Court has previously affirmed the federal policy favoring rapid disposition of labor disputes. *See, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Hoosier Cardinal Corporation*, 383 U.S. 696, 707 (1966). This policy is obviously disserved by the Sixth Circuit's ruling in the instant case. Thus, the ruling of the Sixth Circuit should be reversed and supplanted by a rule of law that allows for a tolling of the statute of limitations until final and binding arbitration has been completed or when the grievance has been finally rejected prior to arbitration.

Second, the decision of the Sixth Circuit totally nullifies the congressional policy favoring the finality of arbitration awards. If the congressional policy expressed in 29 U.S.C. § 173(d) favoring labor arbitration and this Court's rulings in the Steelworkers Trilogy[15] favoring finality of arbitration awards is to have any meaning, the Sixth Circuit's decision must not be allowed to stand. For under the Sixth

[15] *See, United Steelworkers of America* v. *Enterprise Wheel Corp.*, 363 U.S. 593, 599 (1963); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1963); *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574, 578-582 (1960).

Circuit's decision, an arbitration award will very rarely every be final. This conclusion is mandated by the fact that an employee may merely file a petition for rehearing and continue to litigate the propriety of the grievance through the contractual procedure until such time as the employee is ready to institute civil litigation. This practice is expressly condoned by the Sixth Circuit's July 25, 1978 decision.

Thus, although lip service is paid to the principle that arbitration awards should be final, the Sixth Circuit divised a rule of law which totally disserves this purpose. The end result is that arbitration becomes less and less attractive to employers since they are forced, by contract, to arbitrate a dispute and are later forced, by a judicial revision of the express congressional purpose favoring labor arbitration, to relitigate the same dispute in the courts—at the time and place chosen by the employee. It is more advantageous to refuse to arbitrate a dispute and, instead, litigate it in the federal courts on a single occasion, thereby gaining the benefit of the judicial doctrine of *res judicata*.

Although such a course of action would obviously disserve the congressional policy expressed in 29 U.S.C. § 173(d), it assures the employer that he will not have to litigate the contractual propriety of his actions on more than a single occasion.

The Sixth Circuit's decision not only conflicts with the decisions of this Court and other circuit courts of appeals but, most importantly, totally disserves the express federal policy favoring the rapid disposition of labor disputes by arbitration rather than litigation. It is for this reason that this Court should grant Petitioners' request for further judicial review.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT-EMPLOYEE'S AMENDED COMPLAINT STATED A CLAIM FOR THE BREACH OF THE DUTY OF FAIR REPRESENTATION.

On July 17, 1974, the Respondent herein filed its Amended Complaint setting forth three separate counts against the Petitioners and Union. Count I stated Respondent was wrongfully discharged in violation of the collective bargaining contract. Count II alleged breach of the duty of fair representation against the Union only. Count III alleged a conspiracy between the Petitioners and the Union.

The Court of Appeals dismissed Counts II and III holding that they were time-barred because of the statute of limitations. (10a).[16] Count I, however, was allowed to stand

[16] The Petitioners would make manifest to this Court that Count I alleges a cause of action based upon wrongful discharge without any allegation of a breach of the Union's duty of fair representation. As Counts II and III have been dismissed, Count I must set forth a cause of action sufficient in and of itself in order to be sustainable by this Court. *Chappell & Co., Inc.* v. *Santangelo*, 30 F.Supp. 599 (D.C. Conn. 1939); *Herman* v. *Prudence Mutual Casualty Co.*, 41 Ill. 2d 468, 472, 244 N.E.2d 809, 811 (1969); *Lambert* v. *Southern Counties Gas Company of California*, 52 Cal. 2d 347, 352, 340 P.2d 608, 611-612 (1959); *McGovern* v. *Kraus*, 192 Wis. 558, 563, 213 N.W. 332, 334 (1927). This provides a clear basis for reversal of the Court of Appeals since Count I is clearly not sustainable in and of itself. A § 301 action standing alone and without an allegation that the Union breached its duty of fair representation is not actionable where the parties have participated in final and binding arbitration. *See, Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976).

Thus, the Court of Appeals' conclusion that: "[Plaintiff] alleged that his discharge was violative of the collective bargaining agreement and that the Union's breach of duty denied him a fair grievance proceeding" is factually incorrect based upon the allegations contained in Count I. (11a-12a).

The Petitioners aver, however, that even the allegations contained in dismissed Count II fail to state anything more than conclusory allegations and thus do not comply with the standard of pleading required to survive Petitioners' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

based upon erroneous conclusions as to the statute of limitations, see pp. 18-34, *supra*.

The Court of Appeals subsequently found that:

> "We think that the Appellant's amended complaint states a colorable § 301 claim for wrongful discharge under the standard enunciated in *Hines*. He alleged that his discharge was violative of the collective bargaining agreement and that the union's breach of duty denied him a fair grievance proceeding. This was sufficient to withstand dismissal for failure to state a claim upon which relief could be granted." (11a-12a). (Footnotes omitted).

The Petitioners submit that the decision of the Court of Appeals was incorrect because it is against federal labor policy; it is also in irreconcilable conflict with the decisions of other circuit courts of appeals; and, it is based upon an erroneous reading of the Respondent's Complaint.

In sustaining Count I, the Court of Appeals seriously undermined federal labor policy. The Court of Appeals premised its decision that Count I was sufficient to withstand dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure upon this Court's decision in *Conley* v. *Gibson*, 355 U.S. 41 (1957). However, *Conley* is factually inopposite to the case at bar.

In *Conley*, the black petitioners brought an action under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, alleging that the railroad had abolished 45 jobs resulting in discharges and demotions of the 45 black petitioners. The plaintiffs alleged that, despite their pleas to the union to represent them, the union did nothing to protect their contractual rights under the parties' collective bargaining agreement.

In *Conley*, no arbitration provision was invoked by the petitioners nor had an arbitration panel been assembled

to hear their complaints. Thus, the strong labor policy favoring final settlement of disputes by methods agreed upon by and between the parties was not present in *Conley*.

In 29 U.S.C. § 173(d) Congress set forth its policy favoring final settlement of disputes by methods agreed upon by the parties:

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be a desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

In decisions subsequent to *Conley*, this Court has consistently cited 29 U.S.C. § 173(d) with approval. *See, Vaca* v. *Sipes*, 386 U.S. 171, 191 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 566 (1960); *Nolde Brothers, Inc.* v. *Local No. 358, Bakery and Confectionary Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977); *Buffalo Forge Company* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 411-412 (1976); *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368, 377 (1974).

Thus, this Court's admonishments in *Conley* that:

> ". . . [A]ll the Rules [Federal Rules of Civil Procedure] require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." 355 U.S. at 47.

must not be considered in a vacuum but must be viewed in light of the congressional mandate of 29 U.S.C. § 173(d) as well as this Court's consistent enforcement of this policy.

Consistent with complaints alleging violations of the

Civil Rights Acts,[17] the congressional mandate of 29 U.S.C. § 173(d) also requires that federal courts demand more than mere broad conclusory allegations in examining complaints alleging breach of the duty of fair representation and wrongful discharge where the employer's action has been subjected to final and binding arbitration. This policy was succinctly stated in *Sedlaric* v. *General Motors Corporation*, 54 F.R.D. 230 (E.D. Mich. 1971), wherein the court stated:

> "The court is inclined to agree with the position taken by the defendants that simple averments of bad faith in representing the plaintiff in his grievance procedure are inadequate to give the plaintiff standing to bring suit in this court, and further, this court agrees that it is incumbent upon the plaintiff as a condition to his seeking relief in this court to plead affirmatively that he has either exhausted his remedies as set forth upon the contract upon which he relies or to plead facts in avoidance of that ob-

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[17] Indeed, complaints alleging violations of the Civil Rights Acts have been carefully scrutinized. The circuit courts of appeals have consistently required specificity in pleadings and have therefore dismissed conclusory allegations, notwithstanding Federal Rule of Civil Procedure 8(a)(2). *See, Rotolo* v. *Borough of Charleroi*, 532 F.2d 920, 923 (3d Cir. 1976); *Albany Welfare Rights Organization Day Care Center, Inc.* v. *Schreck*, 463 F.2d 620, 622-623 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973); *Coopersmith* v. *Supreme Court, State of Colorado*, 465 F.2d 993, 994 (10th Cir. 1972); *Finley* v. *Rittenhouse*, 416 F.2d 1186, 1187 (9th Cir. 1969); *Metcalf* v. *Swank*, 444 F.2d 1353, 1358 (7th Cir. 1971); *Wilson* v. *Lincoln Redevelopment Corporation*, 488 F.2d 339, 341 (8th Cir. 1973); *Hughes* v. *Ranger Fuel Corporation, Division of Pittston Corp.*, 467 F.2d 6, 10 (4th Cir. 1972); *Ogletree* v. *McNamara*, 449 F.2d 93, 98 (6th Cir. 1971). Courts have consistently taken this approach because of the increasingly large volume of cases brought under the Civil Rights Acts, a substantial number of which are frivolous. Furthermore, it is an important national policy to weed out frivolous and insubstantial cases at an early stage to keep the doors open for legitimate ones. *See, Kauffman* v. *Moss*, 420 F.2d 1270, 1271 n. 15 (3d Cir. 1970).

ligation showing that such procedures would be futile. (Citations omitted).

The court recognizes the argument of the plaintiff that in most cases scanty allegations such as contained in plaintiff's complaint might be sufficient in view of the broad discovery powers of the Federal Rules under 'notice pleading' concepts. It would seem to the court that in actions of this nature, however, it is incumbent upon the party seeking relief to set out with greater specificity those facts which entitle him to present his case in court. *The thrust of the law in this area seems strongly to suggest that its purpose is to provide an orderly and fair processing of grievances and one which will subject neither the employer, the employee and the Union to expensive litigation in court unless and until all other remedies have reasonably been exhausted. Thus, the very purpose of the collective bargaining agreement is to avoid litigation in court by setting up fair and alternative procedures. A rule of law or of pleading which allows the party to circumvent such policy by merely stating conclusions not supported by the facts to justify them would subvert the purpose of the contract and of federal law governing the relationships, rights, and responsibilities of the party.*" 54 F.R.D. at 233. (Emphasis added).

As this Court stated in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976):

> "[§ 203(d), 61 Stat. 154, 29 U.S.C. § 173(d)] 'can be effectuated only if means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.' *Steelworkers* v. *American Manufacturing Company*, 363 U.S. 564, 566, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960). Courts are not to usurp those functions which collective bargaining contracts have properly 'entrusted to the arbitration tribunal' id., at 569, 4 L. Ed. 2d 1403, 80 S. Ct. 1343. They should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise 'plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.' *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960)." 424 U.S. at 563.

This Court recognized in *Hines* that frequent judicial review of labor arbitrations which are subject to grievance procedures would render such procedures meaningless. Indeed, if arbitration is to continue as a preferred method of resolving labor disputes, a strict standard for reviewing the initial allegations of complaints must be adopted by this Court.[18]

The circuit courts of appeals have consistently recognized that mere conclusions, without supporting factual allegations, are legally insufficient to withstand a motion for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[19] *Florey* v. *Air Line Pilots Asso-*

[18] This Court has recognized that "arbitration is the substitute for industrial strife." *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574, 578 (1960). If industrial strife is to be avoided, the finality of arbitration provisions cannot be viscerated.

[19] Indeed, while the Sixth Circuit Court of Appeals distinguished *Balowski* v. *UAW International Union, AFL-CIO*, 372 F.2d 829 (6th Cir. 1967) in that it was a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, the court in *Balowski* specifically held that: "The allegations of a complaint alleging the breach of a union's duty of fair representation must contain more than 'conclusory statements alleging discrimination'." 372 F.2d at 835.

The *Balowski* decision has consistently been cited by other circuits who have dismissed conclusory allegations on the basis of a motion made pursuant to Federal Rule of Civil Procedure 12(b)(6). *See, Lusk* v. *Eastern Products Corporation*, 427 F.2d 705, 708 (4th Cir. 1970); *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853, 859 (8th Cir. 1975).

ciation, International, 575 F.2d 673, 676 (8th Cir. 1978); *Anderson* v. *United Transportation Union*, 557 F.2d 165, 169-170 (8th Cir. 1977); *Lewis* v. *No. 1 Greyhound Lines, East*, 411 F.Supp. 368 (D. D.C. 1976, *aff'd*, 555 F.2d 1053 (D.C. Cir. 1977).[20]

In *Slagley* v. *Illinois Central Railroad Company*, 397 F.2d 546, 552 (7th Cir. 1968), the court held that mere conclusions, without supporting factual allegations, were legally insufficient to withstand a motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). Therein, the Seventh Circuit stated:

> "The pertinent allegations of the complaint are that O.R.C. and B. compelled I.C. to deprive appellant of its seniority, that this action was 'wrongful, unlawful, and unconstitutional', 'arbitrary and capricious', and 'constituted wrongful and unlawful discrimination toward plaintiff', and that the action breached the collective bargaining agreement and violated the Federal and Indiana Constitutions. *We find these allegations insufficient to state a claim for breach of the duty of fair representation. They are mere conclusions of law, plainly insufficient under the Federal Rules of Civil Procedure.*" 397 F.2d at 552.

In *Gainey* v. *Brotherhood of Railway & Steamship*

[20] Similarly, the circuit courts have consistently granted motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 based upon mere conclusory allegations. *See, Whitten* v. *Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975); *Balowski* v. *UAW International Union, AFL-CIO*, 372 F.2d 829, 835 (6th Cir. 1967); *Hardee* v. *Allstate Services, Inc.*, 537 F.2d 1255, 1259 (4th Cir. 1976); *Willetts* v. *Ford Motor Company*, 99 L.R.R.M. 2399 (6th Cir. 1978). *Cf., Hubicki* v. *Ace Industries, Inc.*, 484 F.2d 519, 522-523 (3d Cir. 1973) (summary judgment pursuant to Rule 56 or motion to dismiss pursuant to Rule 12(b)(6) distinction immaterial—conclusory allegations insufficient).

Clerks, 313 F.2d 318 (3d Cir. 1963), the court affirmed a motion to dismiss. In so doing, the Court opined:

> "In order to come within its ambit [doctrine of fair representation], the complaint before us must have more than conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.'" 313 F.2d at 323.

The Fourth Circuit in *Lusk* v. *Eastern Products Corporation*, 427 F.2d 705 (1970) affirmed the dismissal of plaintiffs' complaint because it contained mere conclusory allegations. Therein, the plaintiffs alleged that the union "refused to and continue to refuse" to present grievances for them to the company. The Court wrote:

> ". . . The allegations as complained alleging a breach of a union's duty of fair representation must contain more than conclusory statements alleging improper representation; conclusory allegations without specifying supporting facts to show the union's lack of good faith failed to state a claim. (Citations omitted). Here plaintiffs complained of an illegal combination between union and company in language which was purely conclusory, with no specific factual allegations to support the charges. Since such allegations are insufficient to state a claim of improper representation by the union or collusion between union and company, the lower court could have properly dismissed plaintiff's complaint for failure to state a claim." 427 F.2d at 708.

The Eighth Circuit reached a similar result in *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853 (1975) where the Court stated as follows:

> ". . . Allegations that the union acted 'in an unfair, invidious, unequal and arbitrary manner' toward the plaintiff are mere conclusions of law, plainly insufficient under Federal Rules of Civil Procedure." 510 F.2d at 859.

The application of the proper standard of pleading as required by the other circuit courts of appeals together with the proper legal standard required to establish a breach of the duty of fair representation, manifests that the allegations contained in Respondent's Count II are merely conclusory and fail to affirmatively set forth a cognizable claim.

It is well settled that a breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. *See, Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); *Balowski* v. *UAW International Union, AFL-CIO*, 372 F.2d 829, 834 (6th Cir. 1967); *Trail* v. *International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America*, 542 F.2d 961 (6th Cir. 1976); *Dill* v. *Greyhound*, 435 F.2d 231 (6th Cir. 1970). A claim for the breach of the duty of fair representation is measured by the standards of whether there is fraud, deceit, dishonest conduct or discrimination that is intentional, severe and unrelated to legitimate union activities. *See, Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971); *Woods* v. *North American Rockwell Corporation*, 480 F.2d 644, 648 (10th Cir. 1973); *Reid* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 479 F.2d 517, 520 (10th Cir. 1973).

Paragraph eight of Count II of the Amended Complaint

sets forth innocuous facts from which the Court is expected to infer bad faith. (31a-32a). This clearly does not meet the standard of pleading required. *See, Lewis* v. *No. 1 Greyhound Lines, East*, 411 F.Supp. 368, 370 (D. D.C. 1976), *aff'd*, 555 F.2d 1053 (D.C. Cir. 1977).

Paragraph nine of Count II is totally devoid of any factual allegations upon which a breach of the Union's duty of fair representation can be inferred. It is speculative at best. As was stated in *Hardee* v. *Allstate Services, Inc.*, 537 F.2d 1255, 1260 (4th Cir. 1976): "It is axiomatic that mere speculation cannot support a finding of malice."

Paragraph ten of Count II alleges that the Union did not call a witness on behalf of the Respondent. However, it has consistently been held that the failure of a union to call a witness does not, in and of itself, constitute a breach of the duty of fair representation. *See, Wilson* v. *Washington Post*, 93 L.R.R.M. 2300 (D. D.C. 1976); *Siskey* v. *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 261*, 419 F.Supp. 48, 53 (W.D. Pa. 1976). As has been stated in *Hardee* v. *Allstate Services, Inc.*, 537 F.2d 1255 (4th Cir. 1976):

> "Hardee asserts a general lack of preparation and effort by his union-appointed representative at the arbitration hearing. Specifically, Hardee suggests that his representative should have interviewed Ray and the Allied Dispatchers, Snelgrove and James. In addition, Hardee challenges the failure to call Ray at the hearing and the failure to cross-examine Snelgrove when the latter's testimony at the hearing allegedly diverged from a pre-hearing statement.
>
> Such alleged defaults alone are not of sufficient magnitude to justify inquiry into the merits of an

> arbitral award, and there is no evidence that they influence the award." 537 F.2d at 1258.

As was stated in *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953):

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty in the exercise of its discretion." 345 U.S. at 338.

The Court of Appeals' decision, in holding that Count II of the Amended Complaint, stated a cognizable claim for a breach of the duty of fair representation, was erroneous since it conflicts with the federal labor policy embodied in 29 U.S.C. § 173(d), favoring arbitration as the preferred means of resolving labor disputes; moreover, it is in irreconcilable conflict with the decisions of various circuit courts of appeals that have held that facts, rather than conclusory allegations, must be pled in order to state a claim for a breach of the duty of fair representation; and, finally, it improperly interprets Count I of the Amended Complaint as stating, in and of itself, a cognizable claim under § 301 for wrongful discharge.

If the burden on employees is to remain a substantial one, *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976), the Sixth Circuit's decision must be reviewed since it holds that the pleading of mere conclusions, rather than facts, are sufficient to relitigate the validity of a discharge which has already been upheld by an arbitration panel pursuant to the labor contract.

CONCLUSION

Fundamental to national labor policy is this Court's and congressional mandates favoring the expeditious and final resolution of labor disputes by methods agreed upon between employers and unions who have been selected as the exclusive representative of employees. The Sixth Circuit's opinion in this matter frustrates national labor policy and constitutes an improvident decision based upon prior precedents of this Court and the other circuit courts of appeals. The decision of the Sixth Circuit falls short of meeting either federal labor policy or the rationale of prior precedents.

This petition presents this Court with the opportunity to establish fundamental and clear guidelines relative to actions brought pursuant to § 301 of the National Labor Relations Act. The Petitioners herein respectfully submit that the frustration of national labor policy inherent in the Sixth Circuit's decision mandates that this Court grant Petitioners' request for a writ of certiorari to the Sixth Circuit.

Respectfully submitted,
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Dated: Nov. 13, 1978.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARL L. SMART,

Plaintiff,

v.

ELLIS TRUCKING COMPANY, INC., an Indiana corporation; NAVAJO-ELLIS TRUCKING CO., INC., a New Mexico corporation; jointly and severally, and LOCAL UNION NO. 299, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Defendants.

Civil Action No. 74-70514

MEMORANDUM OPINION

The court has before it Defendants' motions to dismiss Plaintiff's amended complaint pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P. Plaintiff bases this court's jurisdiction on 29 U.S.C. § 185.

Plaintiff, EARL L. SMART, a member of Defendant LOCAL UNION NO. 299 (hereinafter the "UNION"), was discharged from his employment with Defendants ELLIS TRUCKING CO., INC. and NAVAJO-ELLIS TRUCKING CO., INC. (hereinafter "ELLIS"), for allegedly failing to follow some instructions given to him while performing his duties at a Kroger Supermarket. Plaintiff claims that his instructions to perform certain work would have been dangerous and contrary to safety standards. A letter from ELLIS informing Plaintiff of his discharge was dated September 15, 1969. Grievances

were filed pursuant to the collective bargaining agreement and the matter went to arbitration where it was resolved against the Plaintiff on both the initial hearing and upon rehearing. In addition, Plaintiff's complaint before the National Labor Relations Board (NLRB) was investigated and found not to be supported by sufficient evidence.

On Octber 16, 1973, the Plaintiff filed a complaint against ELLIS alleging that his termination was in derogation of the collective bargaining agreement because it was without just causes and without an initial warning letter, required unless the discharge is for dishonesty, drunkenness, recklessness, or carrying unauthorized passengers while on the job. ELLIS moved to dismiss this complaint but, before the motion could be brought for hearing, the Plaintiff, pursuant to Rule 15(a), Fed. R. Civ. P., filed an amended complaint. The amended complaint was in three counts and added the UNION as a party Defendant.

Count one is against ELLIS and was based upon Plaintiff's failure to receive the warning letter before his discharge. Count two is against the UNION and alleges a breach of the UNION's duty of fair representation. Plaintiff charges that the UNION was guilty of collusion with the employer, ELLIS, in handling his grievance by the UNION's refusal to call a witness that Plaintiff had suggested. Count three alleges that the UNION and ELLIS conspired in the handling of the grievance for the purpose of discharging the Plaintiff. This allegation is also based upon the failure of the UNION to utilize the testimony of Plaintiff's suggested witness and for failure of the UNION to bring out the facts surrounding the incident leading to his discharge. Acts in furtherance of the alleged conspiracy include allegations that ELLIS wrongfully, and unsuccessfully, disputed Plaintiff's claims for unemployment benefits and that the UNION failed to present enough facts to support Plaintiff's unsuccessful claim before the NLRB.

Both the UNION and ELLIS brought motions to dismiss Plaintiff's amended complaint. Plaintiff filed a response to the motions and ELLIS filed a reply to that response. On August 12, 1974, the motions were heard and taken under advisement. On August 22, 1974, before a decision on the motions and without formally obtaining the leave of this court or written consent of the Defendants, as required by Rule 15(a), Fed. R. Civ. P., the Plaintiff filed a second amended complaint. Thus, if the amended complaint were dismissed, Plaintiff would not be allowed, as a matter of right, to submit his second amended complaint. J. Moore, *Moore's Federal Practice* ¶ 15.07[2], at 853-55 (2d ed. 1974). The merits of Plaintiff's second amended complaint, however, need not be addressed because the grounds upon which the amended complaint will be dismissed would apply to the second amended complaint.

Defendant ELLIS, as to each count of the complaint, argues that the applicable statute of limitations has run. As to count one, this argument is based on the contention that Plaintiff, in fact, seeks to set aside an arbitration award and that the statute of limitations applicable to a claim for such relief is either three months under the United States Arbitration Act, 9 U.S.C. § 12, or twenty days under Michigan General Court Rule 769 dealing with arbitrations. ELLIS argues that, whichever limitations period applies, the period to bring suit has run because the arbitration award was given on January 20, 1971, and the complaint was not filed until October 16, 1973. As to count two, ELLIS and the UNION contend that claims of

unfair representation are governed by Michigan's three year statute of limitations applicable to personal injuries. See M.C.L.A. § 600.5805(7). The same statute of limitations, it is argued, applies to bar the conspiracy alleged in count three as well. In addition to its statute of limitations arguments, ELLIS also contends that count one must fail because, as a matter of law, the arbitrator's decision is entitled to binding weight. Further, it is alleged that counts two and three fail to state a claim for relief. The UNION addresses itself to counts two and three, making the same statute of limitations arguments as are raised by ELLIS.

It is unnecessary to consider the statute of limitations to dismiss count one of Plaintiff's complaint because this court, as a matter of law, is barred from entertaining it. The question of a possible breach of the employment contract was resolved by the arbitrator against the Plaintiff. The collective bargaining agreement provided for a grievance process culminating in arbitration. That process has been followed in this case and, under these circumstances, the arbitrator's decision is binding. *See Humphrey* v. *Moore*, 375 U.S. 335, 350-51 (1964). "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). In *United Steelworkers*, the Supreme Court held that a district court should not attempt to interpret the collective bargaining contract on a matter that has already been decided by an arbitrator. The rationale for this decision stems from the fact that it was the arbitrator's, not the court's, construction of the contract that was bargained for between the parties. *Id.* at 599. The cases cited by Plaintiff, in which

the right to bring an action for violation of a collective bargaining agreement is recognized, are distinguishable on the grounds that they recognize the right "is not an unlimited one", and that the grievance had not proceeded to arbitration. *See, e.g., Broniman* v. *Great Atlantic & Pacific Tea Co.*, 353 F.2d 559, 561 (6th Cir. 1965). In the case now before the court, the Plaintiff's grievance was twice considered in arbitration. On these grounds, therefore, the Plaintiff's first count against Defendant ELLIS must be dismissed.

Plaintiff's second count alleges a breach of the UNION's duty of fair representation. The authorities are divided on the question whether an action for unfair representation is an action in tort or an action for breach of contract for purposes of applying the appropriate statute of limitations. *Compare DeArroyo* v. *Sindicato De Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970); *Falsetti* v. *Local 2026, United Mine Workers of Am.*, 355 F.2d 658 (3d Cir. 1966), *with TUMA* v. *Am. Can Co.*, 367 F. Supp. 1178 (D. N.J. 1973). It appears that the better approach, and the approach adopted in *Priest* v. *Wolverine Express, Inc.*, 87 L.R.R.M. 2774 (W.D. Mich. 1974), is to consider a claim of unfair representation by a union as tortious in nature and apply the three year statute of limitations contained in M.C.L.A. § 600.5805(7). *See also Williams* v *Dana Corp.*, 54 F.R.D. 473 (E.D. Mich. 1971). In *Williams*, Judge Thornton faced a situation in which the plaintiff, a union member, attempted to add the union to his complaint in order to assert a claim against it based on failure to fairly represent him. In denying the motion, Judge Thornton noted that:

> the period for commencing this action against the Union (the Michigan three-year statute of limitations

> being applicable) terminated by the end of 1970 at the very latest. The United States Supreme Court has said that in the absence of a federal statute of limitations in this kind of case the state statute should be applied

54 F.R.D. at 474, citing *Int'l Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966). In the case now before the court, Plaintiff's case was finally decided on April 14, 1971 when the arbitration panel denied his rehearing. Any claim he may have been able to assert in this court against the UNION for a failure to fairly represent him in arbitration had run in April, 1974. Plaintiff's amended complaint, which involved the UNION in the lawsuit for the first time, was filed on June 17, 1974, more than three years from the arbitrators' final decision. Further, the amendments to Plaintiff's complaint do not relate back to the original complaint filed in this action which involved only the Defendant ELLIS. Addressing this point in *Williams*, Judge Thornton noted that "the claim against the defendant Union is a separate independent cause of action from that against [the company], although the factual background is similar with respect to [the company] and the Union". 54 F.R.D. at 474; *see also* Fed. R. Civ. P. 15(c)(2); J. Moore, *supra*, ¶ 15.15[4.001], at 1041-48. Thus, Plaintiff's second count against the UNION is barred by the three year limitation period for tortious actions contained in M.C.L.A. § 600.5805(7).

Finally, in count three, Plaintiff has alleged a conspiracy against both the UNION and ELLIS. This count must also be dismissed for reasons similar to those stated in the discussion of count two. Michigan characterizes claims of conspiracy to deprive a plaintiff of rights under a collective bargaining contract as tortious in nature. *Field* v. *Local 652, UAW AFL-CIO*, 6 Mich. App. 140, 147 & n. 3; *see also Kennedy* v. *Local 38, CIO*, 3 Mich. App. 700, 705-06 (1966). Therefore, the same three year statute of limitations applicable to count two would also apply to count three. See M.C.L.A. § 600.5805(7). Therefore, Plaintiff's conspiracy count must also be dismissed.

For the foregoing reasons, the court is of the opinion that Defendants' motions to dismiss Plaintiff's complaint are meritorious and should, therefore, be granted.

/s/ LAWRENCE GUBOW
U. S. District Judge

Dated: Feburary 13, 1976.

Order of February 13, 1976

(Title of Court and Cause)

ORDER

At a session of said court held at Detroit, Michigan, this 13th day of February, 1976.

PRESENT: Hon. Lawrence Gubow, U. S. District Judge.

For the reasons stated in the memorandum opinion issued in this cause on this date,

IT IS ORDERED that the motions by Defendants to dismiss Plaintiff's complaint should be, and hereby are, GRANTED.

/s/ LAWRENCE GUBOW
U. S. District Judge

No. 76-2439

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Earl L. **Smart**,
Plaintiff-Appellant,

v.

Ellis Trucking Company, Inc., an Indiana Corporation, Navajo-Ellis Trucking Co., Inc., a New Mexico Corporation, jointly and severally, and Local Union No. 299, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed July 25, 1978.

Before: Celebrezze, Engel and Merritt, Circuit Judges.

Celebrezze, Circuit Judge. Appellee Ellis Trucking Company dismissed Appellant on September 15, 1969. Appellant contended that his discharge was wrongful, and sought arbitral relief as provided in the collective bargaining agreement between Ellis and his union, Local 299 of the International Brotherhood of Teamsters. The matter was referred to the Joint State Cartage Committee, which upheld the discharge on September 16, 1969, and again on January 20, 1971, after a rehearing.

On October 16, 1973, Appellant filed a complaint against Ellis in the Eastern District of Michigan, alleging that his discharge was violative of the collective bargaining agreement. An amended complaint filed on June 17, 1974, added a second count against Local 299 alleging breach of duty

of fair representation and a third count stating that Ellis and the union had conspired to have Appellant discharged.

Upon motion by the Appellees, the District Court dismissed the amended complaint for failure to state a claim upon which relief could be granted. 409 F. Supp. 129 (E.D. Mich. 1976). As to the wrongful discharge allegation in count I, the court found the arbitral decision upholding the discharge to be binding and unreviewable. 409 F. Supp. at 131. The fair representation and conspiracy claims in counts II and III were held barred by Michigan's three-year statute of limitations applicable to tort actions. *Id.* at 132. In this appeal, Appellant maintains that none of the counts should have been dismissed.

We deal first with the holding below that counts II and III were time-barred. The District Court properly read the complaint as alleging jurisdiction under § 301 of the Labor Management Relations Act (LMRA or the Act), 28 U.S.C. § 185, which provides federal jurisdiction for suits by individual employees alleging wrongful discharge under a collective bargaining agreement and for included claims of union breach of fair representation duty. *See Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 562 (1976); *Vaca* v. *Sipes*, 386 U.S. 1971, 186-87 (1967).

The timeliness of actions under § 301 is determined by reference to the appropriate state statute of limitations. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966). Here, we look to the law of Michigan, which is both the forum state and the state in which the operative events occurred, *See id.* at 705 n. 8. Michigan courts apply a three-year limitation period to actions for breach of the duty of fair representation brought in conjunction with wrongful discharge claims. *Glowacki* v. *Motor Wheel Corp.*, 241 N.W.

2d 240, 246-48 (Mich. App. 1976); *Washington* v. *Chrysler Corp.*, 242 N.W. 2d 781, 782 (Mich. App. 1976).[1] The same limitation period is applied to related claims of conspiracy between an employer and a union. *Glowacki* v. *Motor Wheel Corp.*, 241 N.W. 2d 240, 245-48 (Mich. App. 1976). *See also Field* v. *Local 652, UAW*, 148 N.W. 2d 552 (Mich. App. 1967).

In this case, the breach of fair representation duty (count II) and conspiracy (count III) claims were first filed on June 17, 1974, over three years after final rejection of Appellant's wrongful discharge claim by the arbitration committee on January 20, 1971. Those counts, standing alone, are therefore time-barred. We are faced with the further question, however, of whether counts II and III might relate back to the date of the original complaint for statute of limitations purposes. Such relation back of amendments to a complaint is permitted in some cases under Federal Rule of Civil Procedure 15(c). Upon consideration, we conclude that the amendments in this case cannot relate back for limitation purposes. Counts II and III involve addition of a defendant (the union) to the original suit against the employer. This Court has previously ruled in a similar case that amendments which add a party to the original suit cannot relate back for limitation purposes. *Marlow* v. *Fisher Body*, 489 F.2d 1057, 1064-65 (6th Cir. 1973). Accordingly,

[1] The Michigan courts reach this result by characterizing the action as one for injury to person or property, governed by the three-year period in M.C.L.A. § 600.5805(7). Although characterization of the action for the purpose of selecting the appropriate state limitations provision is "ultimately a question of federal law," the state court characterization should not be rejected unless it is "unreasonable or otherwise inconsistent with national labor policy." *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966). We see nothing in the Michigan characterization that is either unreasonable or inconsistent with national labor policy and adopt it here.

it was proper for the District Court to dismiss those counts as being time-barred.

Dismissal of Count I presents more serious problems. The District Court felt bound by the arbitral decision rejecting Appellant's wrongful discharge claim because "it was the arbitrator's, not the court's, construction of the contract that was bargained for between the parties." 409 F. Supp. at 131, *citing United Steelworkers of America* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960). Under the collective bargaining agreement between Ellis and the union, a decision by the Joint State Cartage Committee is "final and binding" on the parties.

Such a "finality" provision is entitled to great deference by courts in light of Congressional policy favoring final adjustment of labor disputes through agreed upon grievance procedures. *See Humphrey* v. *Moore*, 375 U.S. 335, 351 (1964); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960). The Supreme Court has recognized an exception to this general rule, however, where the union has breached its duty of fair representation. Shortly after the District Court's decision in this case, the Supreme Court held in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976), that an employee denied reinstatement by an arbitration committee could still obtain judicial review of his wrongful discharge claim under § 301 of the LMRA if he could show that the arbitral process had been seriously undermined by the union's failure to fairly represent him. Under such circumstances a union's breach of duty "removes the bar of the finality provisions of the contract." *Id.* at 567.

We think that Appellant's amended complaint stated a colorable § 301 claim for wrongful discharge under the

standard enunciated in *Hines*.[2] He alleged that his discharge was violative of the collective bargaining agreement and that the union's breach of duty denied him a fair grievance proceeding. This was sufficient to withstand dismissal for failure to state a claim upon which relief could be granted.[3] *Cf. Desrosiers* v. *American Cyanamid Co.*, 377 F.2d 864, 870-71 (2d Cir. 1967). The fact that the arbitration committee had already decided against Appellant did not bar his federal action at the outset, since he properly alleged breach of the union's duty of fair representation. *Hines*, 424 U.S. at 567. Nor does it matter that the fair representation claim is barred by the statute of limitations. If Appellant's representation by the union has *in fact* been fundamentally unfair, then the arbitral proceeding is a nullity, and he is free to pursue his § 301 claim against the employer. *See id.* at 567-69.

Ellis argued below that the wrongful discharge claim was time barred. The argument was based on the contention that Appellant is actually seeking to set aside an arbitration award, and that the statute of limitations applicable to a claim for such relief is either three months under the United States Arbitration Act, 9 U.S.C. § 12, or

[2] Incredibly, counsel for the Appellant failed to even cite *Hines* in his brief to this court filed over nine months after *Hines* was decided. *See* ABA Code of Professional Responsibility Canon 6 & DR 6-101(A)(2).

[3] We have previously ruled that mere conclusory allegations of unfair representation are insufficient to withstand a properly supported motion for summary judgment. *Balowski* v. *UAW*, 372 F.2d 829, 835 (6th Cir. 1967). *See also Hines* v. *Local Union No. 377*, 506 F.2d 1153, 1157 (6th Cir. 1974), *rev'd in part on other grounds*, *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976). Here, however, we review the sufficiency of a complaint on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and must apply a liberal construction of the complaint in favor of the party opposing the motion. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Davis H. Elliot Co.* v. *Caribbean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975).

twenty days under Michigan General Court Rule 769 dealing with arbitrations. 409 F. Supp. at 131. The District Court found it unnecessary to reach the issue, but Ellis presses it again before this Court. The simplest answer to Ellis' argument is that Appellant's action for wrongful discharge is not in the nature of a motion to vacate or modify an arbitration award, at least to the extent that it states a claim under § 301.[4] Although the effect of a judgment for Appellant would be to nullify the arbitral decision, the § 301 action is "independent" of the grievance process. *See Hines* v. *Anchor Motor Freight*, 424 U.S. at 554. Indeed, such a claim can be brought even before an arbitral decision, where a union refuses in bad faith to process a grievance. *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967). The fact that the Plaintiff must show a flaw in the grievance process as a prerequisite to recovery does not alter the basic focus of the § 301 claim on the propriety of the discharge itself. Since Michigan applies a three year limitation period to wrongful discharge claims such as the one here raised *(see Glowacki, supra)*, the action was not time-barred.[5]

The judgment of the District Court dismissing Count I of the amended complaint is reversed, and the case is remanded for further proceedings consistent with this opin-

[4] *Contra, Hill* v. *Aro Corp.*, 275 F. Supp. 482, 487 (N.D. Ohio 1967).

[5] Although more than three years elapsed between Appellant's discharge and the filing of his complaint, we think it only fair that the statute of limitations be tolled from the time the grievance was filed until it was finally rejected. (i.e., when the arbitration award was upheld on rehearing). Federal labor policy generally requires that a § 301 plaintiff seek arbitral relief as a prerequisite to his federal claim. *Vaca* v. *Sipes*, 386 U.S. 171, 185 (1967). Litigants should not be penalized for complying with that policy. *Cf. Butler* v. *Local Union 823*, 514 F.2d 442, 450 (8th Cir.), *cert. den.*, 423 U.S. 924 (1975).

ion.[6] The judgment of the District Court dismissing Counts II and III is affirmed.

(Title of Court and Cause)

Decided and Filed August 16, 1978.

Before: CELEBREZZE, ENGEL AND MERRITT, Circuit Judges.

Appellees having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF
THE COURT
/s/ John P. Hehman, Clerk
/s/ Grace Keller, Chief Deputy

[6] If on remand the trial court determines that plaintiff is entitled to reinstatement, it will be faied with the further question of the extent to which the employer's liability for any backpay may be limited, should it appear that the employer justifiably relied upon the finality of the arbitration decision upholding the discharge and had no part in undermining the process of arbitration. *See generally Hines, supra*, 424 U.S. at 572-73 (Stewart, J., concurring); *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 312 (6th Cir. 1975).

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARL L. SMART,
Plaintiff

-vs-

ELLIS TRUCKING CO., INC., an Indiana Corporation, and NAVAJO-ELLIS TRUCKING CO., INC., a New Mexico Corporation, jointly and severally,
Defendants

Lawrence Gubow
Civil Action
No. 4-70514

COMPLAINT

NOW COMES Earl Smart, Plaintiff, by his Attorney, GEORGE BASHARA, SR., and for his Complaint in this cause respectfully shows unto this Honorable Court as follows:

1. That Plaintiff is a citizen of the State of Michigan, and Defendant Ellis Trucking Co., Inc. is a corporation incorporated under the laws of the State of Indiana and is authorized to do business in the State of Michigan. Plaintiff is informed and believes that Defendant Navajo-Ellis Trucking Co., Inc. is incorporated under the laws of the State of New Mexico and is authorized to do business in the State of Michigan.

2. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

3. Plaintiff is informed and believes and verily charges the truth to be that Defendant Ellis Trucking Company, merged with Navajo Freight Lines, Inc. forming Navajo-Ellis Trucking Company and/or sold its franchise and business to Navajo-Ellis Trucking Co., which assumed all of Ellis Trucking Company's debts and obligations of every kind and nature which would include Plaintiff's claim herein and including its obligations under the contract with Local 299 of the Teamsters Union hereinafter set forth.

4. That on or about September 15, 1969 Plaintiff was in the employment of the Defendant, Ellis Trucking Co., Inc. arising under a written contract of employment, between the Defendant and Local Union No. 299 affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Article 44 of the Central States area Local Cartage Supplemental Agreement to the aforementioned contract, reads in part as follows:

> "The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Local Union and job steward affected, except that no warning notice need be given to any employee before he is discharged if the cause of such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. . . ."

5. Contrary to the contract of employment as aforesaid, the Defendants on September 15, 1969, discharged the Plaintiff without just cause.

6. Also contrary to the contract of employment as aforesaid, the Defendants failed to give at least one warning notice of the complaint against the Plaintiff to the Plaintiff in writing, as required by the employment contract. The cause of such discharge was not "dishonesty or drunkenness or recklessness, nor the carrying of unauthorized passengers."

7. The Plaintiff has exhausted all grievance procedures and administrative remedies under the Contract in an attempt to be reinstated, without success.

8. The Plaintiff has at all times been ready, willing and able to perform his part of said agreement and has at various sundry times since September 15, 1969, made demand upon the Defendants to perform the terms thereof, as required by the said Agreement.

9. That just prior to the date of discharge Plaintiff's average work week was forty (40) hours straight time and 7.06 hours overtime. Plaintiff's rate at that time was $4.13 per hour straight time and $6.195 per hour overtime. Therefore, Plaintiff's average weekly pay check was $208.94, plus fringe benefits, as provided for in the aforementioned contract of employment fringe benefits.

10. That subsequent to the date of discharge the contract of employment has provided for periodic increases in the hourly rate for Plaintiff's classification, to which he would have been entitled, had defendants not unlawfully discharged him.

11. That as a result of the unlawful discharge of the Plaintiff, which was in violation of the contract of employ-

ment, the Plaintiff has been deprived of the opportunity of earning upwards of Fifty Six Thousand Dollars ($56,000.00) in gross wages, plus all of the fringe benefits provided in said contract of employment, which fringe benefits have a value of upwards of Twelve Thousand Dollars ($12,000.00), from the date of discharge until the commencement of this suit.'

WHEREFORE Plaintiff hereby demands reinstatement to his former position together with a judgment against the Defendants for all back pay and fringe benefits to which he would have been entitled together with interest thereon from September 15, 1969, until paid, plus cost of this suit and attorney fees, to his damages in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars for which he brings this suit.

DATED: October 12, 1973.

/s/ Earl L. Smart, Plaintiff

GEORGE BASHARA, SR.
Attorney for Plaintiff
20233 Mack Avenue
Grosse Pointe Woods, Mi. 48236
884-9410

STATE OF MICHIGAN)
SS.
COUNTY OF WAYNE)

Earl L. Smart being first duly sworn says that he is the Plaintiff in the above captioned cause; that he has heard read the foregoing Complaint by him signed and understands the meaning and contents thereof and that the same is true of his own knowledge except as to matters therein stated to be upon information and belief and as to those matters he believes it to be true.

/s/ EARL L. SMART

Subscribed and sworn to before me
this 12th day of October, 1973
/s/ ELIZABETH M. HULL
Notary Public, Macomb County, acting
in and for Wayne County, Michigan
My commission expires: Dec. 2, 1975

(Title of Court and Cause)

MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO F.R.C.P. 12(b)(1) and (6) FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

NOW COME Defendants, by and through their attorneys, George T. Roumell, Jr., and Riley and Roumell, and move this Honorable Court to dismiss said cause pursuant to F.R.C.P. 12(b)(1) and (6), for the reason that the relief prayed in Plaintiff's Complaint cannot be granted for the following reasons:

1

A. That Plaintiff alleges in paragraph 7 of his Complaint, that he exhausted all grievance procedures under the collective bargaining agreement.

B. That Plaintiff's grievance was processed, pursuant to the terms of the collective bargaining agreement, to arbitration before the Joint State Cartage Committee which denied said grievance on September 16 and 17, 1969. (See attached Exhibit A).

C. That the Joint State & Cartage Committee denied rehearing on October 21, 1969. (See attached Exhibit B).

D. That the collective bargaining agreement between the parties provides that the decision of the joint State Cartage Committee is final and binding upon the parties. (See attached Exhibit C).

E. That, as a matter of law, Plaintiff's exclusive remedy was that provided in the collective bargaining agreement and Plaintiff is barred from maintaining an action at law in this matter. *Humphrey* v. *Moore,* 375 U. S. 335, 351 (1964); *Union News* v. *Hildreth,* 295 F 2d 658 (6th Cir. 1961); *Simmons* v. *Union News Company,* 341 F 2d 531 (6th Cir. 1965); *Rushton* v. *Howard Sober, Inc.,* 198 F. Supp. 337 (WD Mich. 1961).

II

F. Plaintiff has refused to concur in this Motion.

WHEREFORE, for the above reasons, Defendants pray that the Complaint be dismissed with prejudice and that costs and attorney fees, so wrongfully sustained, be awarded to Defendants.

RILEY AND ROUMELL
By:
/s/ George T. Roumell, Jr.
and
/s/ John F. Brady
Attorneys for Defendants
720 Ford Building
Detroit, Michigan 48226
Telephone: 962-8255

Dated: March 18 ,1974.

EXHIBIT C TO MOTION TO DISMISS PLAINTIFF'S COMPLAINT— CONTRACT EXCERPTS

Central States Area
Local Cartage Supplemental Agreement

ARTICLE 43.

Grievance Machinery and Union Liability

The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, and in the National Agreement, if applicable, of any controversy which might arise.

Section 1.—*General*

Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Local Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint State Cartage Committee. Such decisions will be final and binding on both parties.

(b) Where a Joint Local Area Committee is unable to agree or come to a decision on a case, or where there is no such committee, it shall, at the request of the Union or the Employer involved, be appealed to the Joint State Cartage Committee at the next regular constituted session.

Minutes of the local committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint State Cartage Committee.

(c) Where a Joint State Cartage Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint Area Cartage Committee. Such decision will be final and binding on both parties.

(d) Where a Joint State Cartage Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Area Cartage Committee at the next regular constituted session, unless the parties mutually agree to umpire handling. Matters pertaining to interpretation are not subject to umpire handling at this level.

Where the Joint Area Committee by majority vote settles a dispute such decision shall be final and binding on both parties with no further appeal.

(e) It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by the State Secretary for the Union or the State Secretary for the Employers at the request of either the Employer or the Union parties to the issue with notice to the other Secretary, to the Joint Area Area Cartage Committee at any time for final decision. At the request of the Company or Union representative, the Joint Area Cartage Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

(f) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Cartage Committee determine to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(g) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any

stage, or failure to comply with any final decision, withdraws the benefits of ARTICLE 43.

(h) In the event of strikes or work stoppages or other activities which are permitted in case of deadlock, default, or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

(i) The procedures set forth herein may be invoked only by the authorized Union representative or the Employer.

Section 2.

It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. The Union may, from time to time, amend its list of authorized representatives by notification by Certified Mail. It is further agreed that in all cases of an unauthorized strike, slow-down, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members.

While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. It is further agreed and understood that the Central States Drivers Council shall not be liable for any strike, breach, or default in violation of this Agreement, unless the act is expressly authorized by its Executive Board. A properly designated officer of the Central States Drivers Council shall, within twenty-four (24) hours after request is made to the Secretary of the Central States Drivers Council, declare and advise the party making such request, by telegram, whether the Council has authorized any strike or stoppage of work. The Central States Drivers Council shall make immediate effort to terminate any strike or stoppage of work which is not authorized by it without assuming liability therefor.

It is understood and agreed that failure of the Central States Drivers Council to authorize a strike by a Local Union shall not relieve such Local Union of liability for

a strike authorized by it and which is in violation of this Agreement.

Section 3.

Notwithstanding anything herein contained, it is agreed that in the event any Employer is delinquent at the end of a period in the payment of his contribution to the Health and Welfare or Pension Fund or Funds created under this Agreement, in accordance with the rules and regulations of the Trustees of such Funds, after the proper official of the Local Union has given seventy-two (72) hours notice to the Employer of such delinquency in Health and Welfare and Pension payments, the Local Union or Area Conference, shall have the right to take such action as they deem necessary until such delinquent payments are made, and it is further agreed that in the event such action is taken, the Employer shall be responsible to the employees for losses resulting therefrom.

Section 4.—*National Grievance Committee*

Grievances and questions of interpretation which are subject to handling under the provisions of Article 8 of the National Agreement shall be referred promptly to the National Grievance Committee in accordance with such Article 8.

ARTICLE 44.

Discharge or Suspension

The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Local Union and job

steward affected, except that no warning notice need be given to any employee before he is discharged if the cause of such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice.

Discharge must be by proper written notice to the employee and the Local Union affected. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated. The Committees established by this Supplemental Agreement and the National Agreement shall have the authority to order full, partial, or no compensation for time lost. Appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice, and a decision reached within thirty (30) days from the date of discharge, suspension or warning notice. If the employee involved is not in the home terminal area when the action of discharge, suspension or warning notice is taken, the ten (10) day period will start from the date of his return to the home terminal. If no decision has been rendered within thirty (30) days, the case shall then be taken up as provided for in ARTICLE 43, Section 1, of this Agreement.

Uniform rules and regulations with respect to disciplinary action may be drafted for each state but must be approved by the Joint State Committee for such state and by the Joint Area Committee. Such approved uniform rules and regulations shall prevail in the application and interpretation of this Article.

(Title of Court and Cause)

AMENDED COMPLAINT
COUNT I

NOW COMES Earl Smart, Plaintiff, by his Attorney, GEORGE BASHARA, SR., and for his Complaint in this cause respectfully shows unto this Honorable Court as follows:

1. That Plaintiff is a citizen of the State of Michigan, and Defendant, Ellis Trucking Co., Inc. is a corporation incorporated under the laws of the State of Indiana and is authorized to do business in the State of Michigan. Plaintiff is informed and believes that Defendant, Navajo-Ellis Trucking Co., Inc. is incorporated under the laws of the State of New Mexico and is authorized to do business in the State of Michigan.

2. That the matter in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND DOLDARS ($10,000.00).

(Deleted in Original)

franchise and business to Navajo-Ellis Trucking Co., which assumed all of Ellis Trucking Company's debts and obligations of every kind and nature which would include Plaintiff's claim herein and including its obligations under the contract with the Local 299 of the Teamsters Union hereinafter set forth.

4. That on or about September, 1969, Plaintiff was in the employment of the Defendant, Ellis Trucking Co., Inc. under a written contract of employment, between the Defendant and Local Union No. 299 affiliate of International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Article 44 of the Central States area Local Cartage Supplemental Agreement to the aforementioned contract, reads in part as follows:

> "The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Local Union and job steward affected, except that no warning notice need to given to any employee before he is discharged if the cause of such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. . . ."

5. Contrary to the contract of employment as aforesaid, the Defendants on September 15, 1969, discharged the Plaintiff without just cause.

6. Also contrary to the contract of employment as aforesaid, the Defendants failed to give at least one warning notice of the complaint against the Plaintiff to the Plaintiff in writing, as required by the employment contract. The cause of such discharge was not dishonesty or drunkenness or recklessness, nor the carrying of unauthorized passengers.

7. The Plaintiff has exhausted all grievence procedures and administrative remedies under the Contract in an attempt to be reinstated, without success.

8. The Paintiff has at all times been ready, willing and

able to perform his part of said agreement and has at various sundry times since September 15, 1969, made demand upon the Defendants to perform the terms thereof, as required by the said Agreement.

9. That just prior to the date of discharge Plaintiff's average work week was forty (40) hours straight time and 7.06 hours overtime. Plaintiff's rate at that time was $4.13 per hour straight time and $6.195 per hour overtime. Therefore, Plaintiff's average weekly pay check was $208.94, plus fringe benefits, as provided for in the aforementioned contract of employment, fringe benefits.

10. That subsequent to the date of discharge the contract of employment has provided for periodic increases in the hourly rate for Plaintiff's classification, to which he would have been entitled, had defendants not unlawfully discharged him.

11. That as a result of the unlawful discharge of the Plaintiff, which was in violation of the contract of employment, the Plaintiff has been deprived of the opportunity of earning upwards of SIXTY-FIVE THOUSAND DOLLARS ($65,000.00) in gross wages, plus all of the fringe benefits provided in said contract of employment, which fringe benefits have a value of upwards of FIFTEEN THOUSAND DOLLARS ($15,000.00), from the date of discharge until the date of filing this Amended Complaint.

WHEREFORE, Plaintiff hereby demands reinstatement to his former position together with a judgment against the Defendants for all back pay and fringe benefits to which he would have been entitled together with interest thereon from September 15, 1969, until paid, plus cost of this suit, attorney fees and interest, to his damages in

the amount of TWO HUNDRED FIFTY THOUSAND ($250,000.00) DOLLARS for which he brings this suit.

/s/ EARL L. SMART
Plaintiff

DATED: June ...., 1974.

COUNT II

NOW COMES Earl Smart, Plaintiff, by his Attorney, GEORGE BASHARA, SR., and for his Complaint in this cause against LOCAL UNION NO. 299, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, shows unto this Honorable Court as follows:

1. That Plaintiff is a citizen of the State of Michigan, and Defendant, LOCAL UNION NO. 299, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the "UNION", is the labor Union in the purview of the Labor Management Acts, enacted by the United States Congress, and particularly the Labor Management Act 29 USC Section 185 and Subsections thereunder, engaged in interstate commerce and affecting interstate commerce.

2. The matter in controversy, exclusive of interests and costs, is the sum of TEN THOUSAND DOLLARS ($10,000.00)

3. For many years the Defendant Union had been selected as the bargaining union representative of the employees of the Ellis Trucking Company and the Navajo-Ellis Trucking Co., Inc., two of the other Defendants named in Count I above.

4. That as such representatives of the employees of the Ellis Trucking Co. and the Navajo-Ellis Trucking Co.,

Inc., the Defendant Union entered into a local cartage supplemental agreement for all of its over-the-road haulers and drivers, including the Plaintiff. Article 44 of the Central States Area Local Cartage Supplemental Agreement, the aforementioned contract, reads in part as follows:

> "The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Local Union and job steward affected, except that no warning notice need be given to any employee before he is discharged if the cause of such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers while on the job. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. . . ."

5. Under said union contract with the Defendant employers, Ellis Trucking Co. and the Navajo-Ellis Trucking Co., Inc., it was the duty of Defendant Union to fairly and fully, without discrimination, represent all of its members, including the Plaintiff in any employer's violation of their just rights under the Labor Management Acts and under the common law in their relationship of employer and employee. The Union owed this Plaintiff, therefore, the duty of fair, full, complete, honest and unbiased representation of any grievance that he might have against his employer, the other Defendants herein, in any violation of his contractual or civil rights under the laws of the United States.

6. Contrary to the contract of employment as aforesaid,

Defendants, Ellis Trucking Company and the Navajo-Ellis Trucking Co., Inc., did on or about September 15, 1969, discharge the Plaintiff without just cause: also, without just cause and contrary to the contract of employment as aforesaid, Defendant employers failed to give at least one warning notice to Plaintiff of their complaints against him in writing as the cause of his discharge, as required by the employment contract. The cause of such discharge was not "dishonesty, drunkenness, recklessness nor the carrying of unauthorized passengers." It was falsely based on a trumped-up charge that he had refused to obey the orders of the Kroger Company in failing to load two "pallets" at a time on the trailer which was being unloaded by a "Hi-Lo" fork lift being operated by Kroger employees. This procedure known by the Kroger Company to be unsafe for the reason that the "Hi-Lo" driver cannot see beyond one "pallet" and a driver could get pinned between the "Hi-Lo" and the freight and could be most seriously injured, all in contravention of the safety rules and regulations and laws of the United States. Nevertheless, Complainant did not refuse to unload two pallets, but could not unload the second pallet until Kroger's employees had removed the first pallet from behind Ellis' trailer. The reason given Complainant was they had no other "Hi-Lo" available, because they were busy elsewhere in the warehouse.

7. That immediately upon his discharge, Plaintiff demanded that Defendant Union file grievances and restore his employment for the reason that he had not done anything in violation of the legitimate laws, rules or regulations of the employers or their customers.

8. That the Union went through several motions allegedly filing documents which were not understood by Plaintiff and supposedly held meetings and hearings at one or two levels. Finally, when he asked that the decision of the various union committees, which had been most unjustly rendered against him, he finally obtained statements from witnesses that the practice that he had followed in refusing to unload two pallets from the trailer was absolutely correct and that to do so was, indeed, a dangerous act and should not have been demanded from him, much less that he should be discharged for refusing and failing to perform such an unsafe activity.

9. That after several fruitless levels of the grievance procedure, so-called, this Complainant charges that there was collusion between the employer and the persons allegedly representing him at these various stages of the grievance procedures. Notwithstanding several sham appeals supposedly made by the Defendant Union to their several committees to overturn such rulings and to give a full and fair hearing, their repeated dictum was: "where a joint state cartage committee by majority vote settles a dispute, no appeal may be taken to the joint area cartage committee. Such decision will be final and binding on both parties." Complainant says that these so-called appeals to the various committees were merely perfuntory, that they were part and parcel of a conspiracy between the Union and the employer to deny this Complainant his just rights under the Labor Management Act and under his civil rights to which he is entitled under the Civil Rights Act of 1964. Complainant says that in all their proceedings he was not fairly, competently thoroughly or completely represented by his Union as he was entitled to be; and that only through a hearing in the Courts of this land can he be accorded his

just, legal and civil rights, because of the desire of the Union to placate the employer irrespective of the civil rights of the employee in the matter.

10. That the Complainant furnished the Defendant Union a copy of an Affidavit of a witness, John Lattimore, who could testify to the facts, but the Union refused to call said witness or to notify said witness to come to the hearing, despite Complainant's repeated pleas to the Defendant Union to call witnesses in presenting his grievance to the several hearing committees. Such failure to present evidence resulted in a chorus of "rehearing denied—no new evidence presented".

WHEREFORE, for the above reasons that the said Union has failed to fairly, honestly and thoroughly represented him in this claim for unjust discharge, said Union should compensate him for all the loss that he has endured from September 11, 1969, to the date of hearings, together with costs, interest, attorney fees and personal damages to the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), for which he brings this suit.

/s/ EARL L. SMART
Plaintiff

DATED: June ...., 1974.

COUNT III

NOW COMES Earl L. Smart, above-named Plaintiff, by his said attorney, GEORGE BASHARA, SR., and complains of all the Defendants, Ellis Trucking Company, Navajo-Ellis Trucking Co., Inc., and the UNION as conspirators to deny him his just hearing to obtain his just rights for his cause of action says:

1. Plaintiff respectfully requests that Court I and Count II of this Amended Complaint be included herein, and hereby adopts them as pertinent paragraphs under Count III, as if the same were repeated in full under Count III.

2. Plaintiff says that all of the Defendants, conspiring together to cheat, wrong and deprive Plaintiff of his just rights to employment under the said National Master Freight Agreement and the Central States Area Local Cartage Supplemental Agreement between the Union representing, (supposedly) the interest of the Plaintiff, and the said employer, the Defendants, Ellis Trucking Company and Navajo-Ellis Trucking Co., Inc.

3. When the grievance was allegedly filed on behalf of this Plaintiff, he left it entirely in the hands of the Union and expected them to protect his rights and to do what had to be done to set aside his unlawful discharge by the other Defendants and relied completely and absolutely on his steward and the other hierarchy of the Union, not only to process his grievance at the first level, but to carry it further to all stages of the grievance procedure, and through the National Labor Relations Board.

4. Plaintiff gave names of two witnesses mentioned in Counts I and II who would testify at any arbitration hearing in favor of this Plaintiff who would testify that it is extremely dangerous to put two pallets on the trailer at the same time. In fact, one of the witnesses himself was injured in loading pallets in that manner. Complainant is informed and believes the truth to be the employee who was injured also was discharged by the Defendant Ellis Trucking Company for complaining about the lack of safety in this method of loading the pallets onto his trailer.

5. Plaintiff further says that the said witness, JOHN LATTIMORE, was prepared to testify for the Plaintiff at several "hearings" conducted by the Union at the several stages, but that the Union never called Mr. Lattimore to testify on behalf of this Plaintiff. This Plaintiff was uninformed and uninitiated in the procedure and relied completely and absolutely on the Union to bring his witnesses to the hearing.

6. When John Lattimore heard that the hearing had been held and that he had not been notified to appear at the hearing to testify on behalf of the Plaintiff, he voluntarily made out an Affidavit stating all the above. This was subscribed and sworn to before Leonard H. Horowitz, Notary Public, Wayne County, Michigan on August 19, 1970. The Plaintiff had several copies of the Affidavit made, sending one each to Mr. Banks, the Steward, the Business Agent, Earl Greyhead (phonetic), and Mr. McMasters at the offices of Defendant Local 299, but said Affidavits were never presented at any meeting of the Grievance Board or any of the joint State Cartage Committee hearings which repeatedly only gave summaries to the effect that they had "heard the evidence" or that "there was no new evidence presented" and refused to give the Plaintiff a rehearing, even when it was brought out that his witnesses were not called by the Union nor were either of the Affidavits ever presented in the presence of this Plaintiff.

7. A driver by the name of Paul believed this Plaintiff in that delivery at the Kroger grocery company, and Plaintiff is informed and believes and charges the truth to be that he too was prepared to testify as to the conduct of this Plaintiff in that delivery to the effect that it was usual and ordinary method of unloading this trailer, one pallet

at a time. Further, that he was told to unload only one pallet from the trailer at a time.

8. Plaintiff further says that after he had loaded one pallet on the dock, he repeatedly requested the "Hi-Lo" driver, foreman, dock workers to remove the pallet so that he could unload his second pallet onto the dock, but none came to do so. Complainant requested the "Hi-Lo" driver to remove the pallet so that he could unload another on the dock, and he again refused to do so, "because he was too busy elsewhere." That when the foreman of the Kroger Company came along the dock and inquired of the Plaintiff why he did not unload the second pallet, Complainant told him that his men had not removed the first pallet from the dock immediately behind Ellis's trailer, and, therefore, Complainant could not safely unload the second pallet for lack of room to maneuver.

9. Thereupon and instantly *the said foreman of the Kroger Company* said to the Complainant, "You are now fired." The foreman then immediately went to the telephone, called Ellis and told him that he had just fired the Complainant and that he did not want him on the premises. In a short time, the Defendant, Ellis, sent another driver to relieve the Complainant and then and there fired this Complainant on the spot without notice and without any legitimate cause therefor. Complainant relayed this information to the Union Steward, Ray Banks, but the Steward and the Union working together and conspiring with the Kroger Company and Defendant Ellis Trucking Company to have this Complainant discharged, refused to bring these facts out at any hearing attended by this Complainant, and the Complainant was summarily discharged and has never been rehired.

10. The action of the Union and of Ellis Trucking Company conspiring together to have this Complainant discharged constituted a conspiracy to deprive this Complainant of his livlihood. Nowhere at any time did the Union admit that they had merely adopted discharge of this Complainant *by the foreman of the Kroger Company;* but on the contrary, Ellis Trucking Company, the Defendant, did also fire this Complainant and the Union did nothing about it, nor did they present this aspect of the case before any grievance board or committee or any of the appellate committees provided in the grievance procedure.

11. Discharge of the Complainant is a direct result of the conspiracy *among Kroger Company foremen, the Ellis Trucking Company* and the Union.

12. Defendant, Ellis Trucking Company, told the Complainant that the reason they were firing him was that the Kroger Company had said that they did not want him to come to their warehouse again. However, these facts although conveyed to the Union representing Complainant at the various hearings were never presented as far as this Complainant was informed or observed. In each instance, the Union, by their respective representatives, merely told the Complainant that his grievance would be heard and he could, on his own time, be present at the grievance hearing and that the result of his grievance would be available after a short time following the hearing. A copy of one of many such notices of the Mar. 16, 1971, Michigan Joint State Cartage and Over-the-Road Arbitration Committee hereto attached and made a part of this paragraph and Amended Complaint and marked as Exhibit G.

13. Complainant further shows that following his unlawful discharge he filed for unemployment benefits with the Michigan Employment Security Commission, but the Defendant, Ellis Trucking Company, in furtherance of its illegal conduct toward this Complainant contested his claim for unemployment benefits by writing Michigan Employment Security Commission that Complainant was "discharged on September 11, because he did not unload his truck to the satisfaction of a customer—that he could unload it on two pallets due to the size of the load and the space left after one pallet was unloaded." The Michigan Employment Security Commission rejected said Defendant's efforts to bar the Complainant from unemployment benefits stating, "his failure to please the customer is deemed not to be deliberately contrary to the employer's interest, and thus, not to constitute misconduct in connection with his work." A copy of said decision of the Michigan Employment Security Commission is hereto attached marked Exhibit D.

14. In a further effort to obtain relief from the unlawful discharge, the Complainant appealed to the Union to file an unfair labor charge against Defendant, Ellis Trucking Company, with the NLRB, which Ray Banks prepared for the Complainant and told him to file it himself. Complainant now understands that the only facts set up in the charge against the employer was simply, "on or about September 11, 1969, the above employer wrongfully discharged Earl Smart." The Complainant was sent by the Union to NLRB without counsel, advisor or representative and was completely unaware of the nature of the proceedings. Complainant says on information and belief that the Union presented no other evidence to the NLRB such as that which has been recited herein, and accordingly on November 13, 1969, the NLRB refused to issue complaint

on the ground that "it appears that *because there* is insufficient evidence of violation, further proceedings are not warranted at this time." A copy of the charge against the employer is hereto attached marked Exhibit E and the denial by the NLRB is hereto attached marked Exhibit F, both copies of which are prayed to be incorporated in this Amended Complaint. (Emphasis supplied)

15. As a result of the said conspiracy and discharge of the Complainant from his employment, he has been barred from any trucking position and has been unable to work at his accustomed trade of semi-truck trailer driver and has had to work at odd jobs at odd times and barely enough to exist.

WHEREFORE, Plaintiff demands a judgment against the conspirator-Defendants, Ellis Trucking Company, Navajo-Ellis Trucking Company and the Union for the sum of TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00) together with interests, costs and attorneys fees.

/s/ Earl L. Smart, Plaintiff

DATED: June 13, 1974

DEMAND FOR TRIAL BY JURY

The Complainant respectfully demands a trial by jury of the matters and issues in the above-entitled cause.

.....

/s/ GEORGE BASHARA, SR.
Attorney for Complainant
20233 Mack Avenue
Grosse Pointe Woods, Mi. 48236
884-9410

DATED: June 13, 1974

EXHIBIT A

GRIEVANCE REPORT
TEAMSTER LOCAL 299

To Whom It May Concern:

I, John Latimore, agreed to write this statement in behalf of Mr. Sma and in the name of safety. In my opinion it is unsafe to put two pallet in a trailer at the same time, also, because I was hurt with two pallet in my trailer. Another reason I say this is because the Hi Lo Driver cann't see beyond one pallet and with two it is unsafe for the truck.

Also, I would like to make a complaint against Mr. Banks (the Steward). I believe it is written in the union rules that the steward must inform a person about a hearing in which, he is to tesify.

Nevertheless, I, John Latimore, was not informed about the hearing of Mr. Smart. I was to testify in the behalf of Mr. Sma.

Therefore, in my opinion this in itself is a miss justice to Mr. Smart. Maybe my testimony would have saved Mr. Smart job.

/s/ JOHNNIE LATIMORE

How Handled: Subscribed and sworn to before me on this 29th day of August 1970

/s/ LEONARD H. HORWITZ
Notary Public, Wayne County, Mich.
My Commission Expires July 25, 1972

EXHIBIT C

GRIEVANCE REPORT
TEAMSTER LOCAL 299

To Whom It May Concern:

I, Earl Smart, would like to lodge a grievance. I would like the union to know that at my hearing, my witness was not notified by the steward to be present in my behalf. Mr. John Latimore and Mr. Joe Stark said that they were not notified.

As the union know I was relieved of my job for not putting two pallets on my trailer, when I was relieved by Mr. Paul Corken. They only required for him to put one pallet on the trailer. To me this seem kind of strange. All truck drivers and Hi-Lo Drivers know it is unsafe to load two pallet at one time. One man (Mr. Latimore) got hurt when they loaded two pallet on his trailer. It is unsafe because the Hi Lo Driver cann't see beyond one pallet. A driver could get pen between the Hi-Lo and freight and get hurt very bad.

The union steward (Mr. Banks) tried to get me to sign papers, saying that I would have to be put on nine months probation. I thought it supposed to be six months. I was also theaten that I would not get a job no where in the city driving. I have a family to support, therefore, I need my job.

/s/ EARL L. SMART

EXHIBIT D

Department of Labor
MICHIGAN EMPLOYMENT SECURITY COMMISSION

4501 Michigan Avenue 07
Detroit, Michigan 48210

NOTICE OF DETERMINATION OR REDETERMINATION

Employing Unit: Ellis Trucking, Inc., PO Box 4449, E. Dearborn, MI 48126.

Claimant: Earl L. Smart, 9403 Prairie, Detroit, Michigan 48204.

Filing Date: 9-17-69; S. S. No. 413 32 9495

[x] Claimant Is Not Disqualified For Benefits: Benefits for the period involved will be withheld pending expiration of the protest or appeal period.

ISSUE(S) AND SECTION(S) OF THE MES ACT INVOLVED

[x] Misconduct—29(1)(b)

BASIS FOR (RE)DETERMINATION

The claimant was discharged on 9-15-1969 because he did not unload his truck to the satisfaction of a customer. He could not unload it on 2 pallets due to the nature of the load and the space left after one pallet was loaded. His failure to please the customer, is deemed not be deliberately contrary to the employer's interest and, thus, not to constitute misconduct in connection with his discharge.

/s/ F. KANNON

EXHIBIT E

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

Case No.: 7-CA-7628
Date Filed: 11-12-69

a. Name of Employer: Ellis Trucking Company, Inc.

b. Number of Workers Employed: 300.

c. Address of Establishment: P.O. Box 449, East Dearborn, Michigan.

d. Employer Representative to Contact: William J. Turk.

e. Phone No.: 849-1100.

g. Identify Principal Product or Service: Truck carrier service.

2. Basis of the Charge:

On or about September 11, 1969, the above-named Employer wrongfully discharged Earl Smart.

3. Full Name of Party Filing Charge: Earl L. Smart.

4a. Address: 9403 Prairie, Detroit, Michigan 48204.

4b. Telephone No.: 934-1219.

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: /s/ EARL E. SMART
9403 Prairie, Detroit, Michigan 48204
November 10, 1969

EXHIBIT F

(Letter Head)

November 13, 1969

Earl L. Smart
9403 Prairie
Detroit, Michigan 48204

Re: Ellis Trucking Company, Inc.
Case No. 7-CA-7628

Dear Mr. Smart:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that because there is insufficient evidence of violation, further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D. C. 20970, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by close of business on November 26, 1969. . Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy

of any such request for an extension of time should be submitted to me.

Very truly yours,
/s/ JEROME H. BROOKS
Regional Director
(National Labor Relations Board
Region 7)

TCN:dfz
cc: General Counsel
National Labor Relations Board
Washington, D. C. 20570

EXHIBIT G

(Letter Head)

Dear Sir and Brother:

Your grievance will be heard before the next meeting of the Michigan Joint State Cartage and Over-the-Road Arbitration Committee on Tuesday, March 16 1971 at the Pick-Fort Shelby Hotel, Lafayette Boulevard and First Street, Detroit, Michigan.

If you so desire to be present on your own time for the hearing of your grievance, you may do so at 9:00 A.M.

Result of your grievance will be available after a short period of time following the hearing. Please contact your Business Agent for the outcome.

Fraternally yours,
LOCAL UNION NO. 299
/s/ DAVID E. JOHNSON
Secretary-Treasurer

(Title of Court and Cause)

MOTION TO DISMISS AMENDED COMPLAINT

NOW COME Defendants, ELLIS TRUCKING COMPANY and NAVAJO-ELLIS TRUCKING CO., INC., by and through their attorneys, GEORGE T. ROUMELL, JR., and RILEY AND ROUMELL, and move this Honorable Court to dismiss said cause pursuant to FRCP 12(b) (1) and (6), on the grounds that the relief prayed for in Plaintiff's Amended Complaint cannot be granted for the following reasons:

I.

A. That the essence of Count I of Plaintiff's Amended Complaint is a claim to set aside the arbitration awards of the Joint State Cartage Committee rendered on September 16, 17, 1969, and January 20, 1971.

B. That Plaintiff's claim in Count I seeks to set aside the arbitration awards of the Joint State Cartage Committee and is therefore barred by the Statute of Limitations.

C. That the collective bargaining agreement between the parties provided that the decisions of the Joint State Cartage Committee is final and binding and that, as a matter of law, Plaintiff is barred from maintaining an action against the employer to disrupt the findings of the arbitrator.

II.

A. The essence of Count II of Plaintiff's Amended Complaint attempts to assert a breach of the duty of fair representation.

B. That any claim for a breach of the duty of fair representation is barred by the Michigan three-year Statute of Limitations.

C. That, as a matter of law, Plaintiff's Amended Complaint fails to set forth any facts concerning bad faith or arbitrary action by the Union, and, therefore, fails to state a claim upon which relief can be granted.

III.

A. The essence of Count III of Plaintiff's Amended Complaint is an alleged conspiracy between the Union and the employer.

B. That said conspiracy, if any exists, which Defendants deny, occurred more than three years prior to the institution of Plaintiff's Amended Complaint and is, therefore, barred by the appropriate Michigan Statute of Limitations.

C. That Plaintiff's Amended Complaint fails to set forth any factual allegations showing a conspiracy and, therefore, fails to state a claim upon which relief can be granted.

IV.

A. Plaintiff has refused to concur in said Motion .

WHEREFORE, for the above reasons, Defendants pray that the Plaintiff's Complaint and Amended Complaint be dismissed with prejudice and that costs and attorneys' fees, so wrongfully sustained, be awarded to Defendants.

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and
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STATUTES

Section 1 of the United States Arbitration Act, 9 U.S.C. § 1 provides:

> "§ 1 'Maritime transactions' and 'commerce' defined: Exceptions to operation of title] 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdictions; 'commerce', as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interestate commerce."

Section 12 of the United States Arbitration Act, 9 U.S.C. § 12 provides:

> "§ 12. Notice of motions to vacate or modify: Service: stay of proceedings.
>
> "Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. The adverse party if a resident of the district within which the award was made,

such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. The adverse party shall be a non-resident and a notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with a notice of motion, staying the proceedings of the adverse party to enforce the award."

29 U.S.C. § 173(d) provides:

"§ 173. Functions of the service.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be a desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

29 U.S.C. § 185 provides:

"§ 185. Suits by and against labor organizations.

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts per-

formed were actually authorized or subsequently ratified shall not be controlling."

M.C.L.A. § 600.5805 provides:

"Limits on actions to recover damages for injuries to persons or property.] Sec. 5805. No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

(1) The period of limitations is 2 years for actions charging assault, battery, and false imprisonment.

(2) The period of limitations is 2 years for actions charging malicious prosecution.

(3) The period of limitations is 2 years for actions charging malpractice.

(4) The period of limitations is 2 years for actions against sheriffs charging misconduct or neglect of office by themselves or their deputies.

(5) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on his negligence or misconduct as constable.

(6) The period of limitations is 1 year for actions charging libel or slander.

(7) The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property."

M.C.L.A. 600.5807 provides:

"Limits on actions to recover damages for breach of contract.] Sec. 5807. No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

(1) The period of limitations on actions charging any surety on any bond of any executor, administrator, [or] guardian is 4 years after the discharge of the executor, administrator, or guardian.

(2) The period of limitations is 10 years for actions founded upon bonds of public officers.

(3) The period of limitations on actions founded upon bonds executed under sections 41.80 and 41.81 of the Compiled Laws of 1948, is 2 years after the expiration of the year for which the constable was elected.

(4) The period of limitations is 10 years for actions founded upon convenants in deeds and mortgages of real estate.

(5) The period of limitations is 2 years for actions charging any surety for costs.

(6) The period of limitations is 2 years for actions brought on bonds or recognizances given on appeal from any court in this state.

(7) The period of limitations is 10 years for actions on bonds, notes, or other like instruments which are the direct or indirect obligation of, or

were issued by although not the obligation of the state of Michigan or any country, city, village, township, school district, special assessment district, or other public or quasi-public corporation in the state of Michigan.

(8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract. (MCL § 600.5807.)"